Supreme Court, U.S.
FILED

No. 94-94 578 SEP 28 1994

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

BRENDA LAMPKIN, AS LEGAL GUARDIAN OF JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

VANESSA RUIZ,
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

*DONNA M. MURASKY,
Assistant Corporation Counsel

Office of the Corporation Counsel
One Judiciary Square — Sixth Floor
441 Fourth Street, N.W.
Washington, D.C. 20001
Telephone: (202) 727-6252 ext. 3303

**Counsel of Record*

34 pp

QUESTION PRESENTED

Whether, in light of *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), a federal grant statute, which, like the McKinney Homeless Assistance Act here, merely requires States and the District of Columbia to submit plans acceptable to designated federal executive branch officials as a condition of receiving federal funding, creates individual rights enforceable pursuant to 42 U.S.C. § 1983.

PARTIES

Petitioners, who were defendants below, are the District of Columbia; its Mayor, Sharon Pratt Kelly; the District of Columbia Public Schools ("DCPS"); and Dr. Franklin L. Smith, DCPS Superintendent. Both the Mayor and Dr. Smith were sued in their official capacities only.

Respondents, who were plaintiffs below, are Brenda Lampkin, as legal guardian of Jessica Lampkin and Christine Lampkin; Sadie Chatmon, as legal guardian of Aqua Chatmon; Denise Dabney, as legal guardian of Dejuan Dabney; Barbette Fribbley, as legal guardian of Ashley Fribbley; Dawn Harvell, as legal guardian of Krystal Harvell and Charles Harvell; Gail Mason, as legal guardian of Clifton Morse, Jr., and Ashley Mason; Twana Robb, as legal guardian of Michael Robb and Calvin Robb; Maria Summers, as legal guardian of Donald Taylor; Patricia Sumpter, as legal guardian of Eric Sumpter; and Cherise Thornes, as legal guardian of Kendra Thornes. In addition, the National Law Center on Homelessness and Poverty, a not-for-profit corporation, was also a plaintiff.

Several members of the House of Representatives appeared as *amici curiae* in the court of appeals: Jim Bacchus, Thomas Foglietta, Tom Lantos, Robert Matsui, George Miller, Patricia Schroeder, Louise Slaughter, and Jolene Unsoeld.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
INTRODUCTION	2
I. THE LANGUAGE OF THE MCKINNEY ACT.	3
II. THE LEGISLATIVE HISTORY OF THE ACT	8
III. THE TRIAL COURT.	11
IV. THE DISTRICT OF COLUMBIA CIRCUIT.	12
REASONS FOR GRANTING THE WRIT	15
I. THE DECISION OF THE D.C. CIRCUIT CONFLICTS WITH THIS COURT'S DECISIONS IN *SUTER* AND *PENNHURST*.	16
II. THE LOWER FEDERAL COURTS EMPLOY CONFLICTING APPROACHES IN CONSTRUING FEDERAL GRANT STATUTES.	24
CONCLUSION	28

TABLE OF AUTHORITIES

CASES

Clifton v. Schafer, 969 F.2d 278 (7th Cir. 1992) 25,27

Cort v. Ash, 422 U.S. 66 (1975) 12

Hendrick Hudson Dist. Bd. of Education v. Rowley, 458 U.S. 176 (1982) 23

Horn by Parks v. Madison County Fiscal Court, 22 F.3d 653 (6th Cir. 1994), *petition for a writ of certiorari pending*, No. 94-164, ... 26,28

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) . . . . . *passim*

Procopio v. Johnson, 994 F.2d 325 (7th Cir. 1993) 27

Resident Council of Allen Parkway Village v. HUD, 980 F.2d 1043, (5th Cir.), *cert. denied*, 114 S. Ct. 75 (1993) 25

Smith v. Robinson, 468 U.S. 992 (1984) 23

Stowell v. Ives, 976 F.2d 65 (1st Cir. 1992) 25,27

Suter v. Artist M., 112 S. Ct. 1360 (1992) . . . . . *passim*

Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990) . *passim*

Wood v. Tompkins, 1994 U.S. App. LEXIS 23498 (6th Cir. August 29, 1994) 27

Wright v. Roanoke Redev. and Hous. Auth., 479 U.S. 418 (1987) 12

TABLE OF AUTHORITIES (continued)

STATUTES

Individuals with Disabilities Education Act,
20 U.S.C. § 1400 *et seq.* 22,23

Adoption Assistance and Child Welfare Act of 1980,
94 Stat. 500, 42 U.S.C. §§ 620-628, 670-679a . . . 16,17

42 U.S.C. § 1983 . . . . . *passim*

Developmentally Disabled Assistance and
Bill of Rights Act, 42 U.S.C. § 6010 20,21

Stewart B. McKinney Homeless Assistance Act,
Pub. L. No. 100-77, 101 Stat. 482, codified
as amended at 42 U.S.C. § 11301 *et seq.* . . . . . *passim*

42 U.S.C. § 11431 3,4,11,12
42 U.S.C. § 11432 . . . . . *passim*
42 U.S.C. § 11433 8,22
42 U.S.C. § 11434 8
42 U.S.C. § 11435 4

MISCELLANEOUS

House Rep. No. 100-10(I), 100th Cong., 1st Sess.,
1987 U.S. Code Cong. & Admin. News 362. 9

House Rep. No. 100-10(II), 100th Cong., 1st Sess.,
1987 U.S. Code Cong. & Admin. News 400. 9

House Conf. Rep., No. 100-174, 100th Cong., 1st Sess.,
1987 U.S. Code Cong. & Admin. News 441 9

133 Cong. Rec. 17926-27, 100th Cong., 1st Sess.
(June 27, 1987). 10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

BRENDA LAMPKIN, AS LEGAL GUARDIAN OF JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, *et al.*,
Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

The District of Columbia and several of its officials petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-18a) is reported at 27 F.3d 605. The decision of the United States District Court for the District of Columbia (App. 21a-35a) is not reported.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

JURISDICTION

The D.C. Circuit entered its judgment on July 1, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Stewart B. McKinney Homeless Assistance Act ("McKinney Act"), Pub. L. No. 100-77, 101 Stat. 482, codified as amended at 42 U.S.C. § 11301 *et seq.*, and 42 U.S.C. § 1983. The pertinent provisions of the McKinney Act are reproduced in the Appendix. App. 37a-52a. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of . . . the District of Columbia, subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured . . ..

STATEMENT OF THE CASE

INTRODUCTION

In recent years, Congress has enacted a wide variety of legislation in which it has offered "seed" money to the States and the District of Columbia to encourage them to address pressing social problems more effectively. One of these efforts is the 1987 McKinney Act.

The McKinney Act is an important, yet modest, federal effort to alleviate homelessness in this country and the problems associated with homelessness. The principal provisions

of the Act are directed at encouraging the identification and development of low-cost housing and increasing the availability of medical treatment, including psychiatric and psychological treatment, for the homeless. In addition, the Act seeks to assist the states and the District of Columbia in improving the education of homeless children. Congress has provided modest sums of money annually to achieve these goals.

Despite the long-range goals of the McKinney Act, and the modest federal funds Congress has provided to implement the Act, the D.C. Circuit, in a two-to-one decision, has held that the Act confers upon homeless children a right to educational and related benefits that is enforceable in an action pursuant to 42 U.S.C. § 1983. In so ruling, the panel majority decided that this case was not controlled by *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), and *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). The panel majority did so even though this Court held that analogous federal funding programs designed to assist the states and the District in helping children in foster care (*Suter*) and mentally disabled persons (*Pennhurst*) did not create rights enforceable pursuant to 42 U.S.C. § 1983. As a result of this decision, a modest federal grant program has been transformed into a largely state-funded entitlement program, and the District of Columbia is now faced with the choice of withdrawing from the program or being saddled with large financial obligations that Congress did not intend to impose.

I. THE LANGUAGE OF THE MCKINNEY ACT.

This case principally involves two sections of Part B of Title VII of the McKinney Act, 42 U.S.C. §§ 11431 & 11432. Section 11431 is a statement of policy. Section 11432 authorizes the Secretary of Education to award federal grants to qualifying states; lists the activities for which such grants

may be used; and describes the elements of a plan a state must submit in order to receive a McKinney Act grant, including state assurances that localities to which it transmits McKinney Act funds will comply with specified conditions.[1/]

More specifically, section 11431 states:

> It is the *policy* of the Congress that--
>
> (1) each State educational agency shall assure that each child of a homeless individual and each homeless youth have *access to a free, appropriate public education* which would be provided to the children of a resident of a State and is consistent with the State school attendance laws.
>
> (2) in any State that has . . . laws, regulations, practices, or policies . . . that may act as a barrier to the enrollment, attendance, or success in school of homeless children and homeless youth, the State *will review and undertake steps to revise such laws* to assure that the children of homeless individuals and homeless youth are afforded a free and appropriate public education.
>
> (3) homelessness alone should not be sufficient reason to separate students from the mainstream school environment.

42 U.S.C. § 11431 (emphasis added).

[1/]The McKinney Act defines the District of Columbia as a state. See 42 U.S.C. § 11435(2).

Section 11432, entitled "Grants for State and local activities for the education of homeless children and youth," has several components that are relevant to this case. Subsection (a) provides that "[t]he Secretary of Education is, in accordance with the provisions of this section, authorized to make grants to States to carry out the activities described in subsections (c), (d), and (e) of this section."

Subsection (c), entitled "Authorized activities," provides in pertinent part:

> *Grants under this section shall be used --*
>
> (1) to carry out the policies set forth in section 11431 of this title in the State;
>
> (2) to provide activities for and services to homeless children and homeless youths that enable such children and youths to enroll in, attend, and achieve success in school;
>
> (3) to establish or designate an Office of Coordinator of Education of Homeless Children and Youth in accordance with subsection (d) of this section;
>
> (4) to prepare and carry out the State plan described in subsection (e) of this section;
>
> (5) to develop and implement programs for school personnel to heighten awareness of specific problems of the education of homeless children and youth . . ..

42 U.S.C. § 11432(c)(emphasis added).

Subsection (d), entitled "Functions of the Office of Coordinator," describes the functions of the Office, including data collection and reporting, development and implementation of the state plan, and co-ordination with other agencies and groups that provide support to the homeless.

Subsection (e), entitled "State plan," is the lengthiest provision. Paragraph (1) states: "Each State shall adopt *a plan* to provide for the education of each homeless child or homeless youth within the State which will contain provisions *designed to*" achieve nine specific goals set forth in subparagraphs (A) through (I). 42 U.S.C. § 11432(e)(1) (emphasis added). The required goals include those *designed to* "provide procedures for the prompt resolution of disputes regarding the educational placement of homeless children and youth" (subpara. (B)); "ensure that homeless children and homeless youths who meet the relevant eligibility criteria are able to participate in Federal, State, or local food programs" (subpara. (D)); "ensure that homeless children and homeless youths who meet the relevant eligibility criteria are able to participate in Federal, State, or local before- and after-school care programs" (subpara. (E)); "address problems with respect to the education of homeless children and homeless youths, including problems caused by . . . transportation issues" (subpara. (G)); and "demonstrate that the State and local educational agencies in the State have developed and will review and revise policies to remove barriers to the enrollment and retention of homeless children and homeless youths in schools of the State" (subpara. (H)).

Paragraph (2) of subsection (e), in turn, requires states to assure the Secretary that they will require localities receiving funding under the Act to meet certain obligations:

> *Each plan . . . shall assure*, to the extent practicable under requirements relating to education established by State law, that local educational agencies within the State will comply with the requirements of paragraphs (3) through (9).

42 U.S.C. § 11432(e)(2) (emphasis added).[2/] The required state plan assurances set forth in paragraphs (3) through (9) include provisions that states "assure" that local educational agencies: place a homeless child in a school that is in his "best interest" (subpara. (3)(A)); provide to each homeless child "services comparable to services offered to other students in the school . . ., including transportation services, educational services for which the child meets the eligibility criteria . . . and school meals programs" (¶(5)); "coordinate with local social services agencies, and other agencies or programs providing services" to homeless children (¶(7)); "designate a homelessness liaison to ensure," *inter alia*, that "homeless children . . . enroll and succeed" in school (¶ 8)); and "review and revise any policies that may act as barriers to the enrollment of homeless children . . . in schools" and "consider[]" "issues concerning transportation, requirements of immunization, residency, birth certificates, school records, or other documentation, and guardianship" (¶(9)).

Finally, subsection (f) governs applications for grants. It provides: "No State may receive a grant . . . unless the State educational agency submits an application to the Secre-

---

[2/]Because the District of Columbia is defined as a state by the McKinney Act (see *supra* note 1) and does not have local educational agencies to which it distributes funds, section 11432(e)(2)-(9) is technically not applicable to it. However, the District concedes that it is bound by the substance of these provisions -- that is, that its plan must assure that it will comply with those provisions.

tary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require."[3/]

II. THE LEGISLATIVE HISTORY OF THE ACT.[4/]

The legislative history of the McKinney Act demonstrates that Congress was acutely aware that state and local resources, both generally and for the purpose of dealing with the problems of the homeless, were stretched to capacity. It also demonstrates that Congress was acutely aware that the

---

[3/]The McKinney Act also contains two other relevant provisions. 42 U.S.C. § 11433(d) governs the content of an application for McKinney Act funds from local to state educational agencies. It states that such an "application shall include . . . assurances that the applicant complies with *or will use requested funds to come into compliance with paragraphs (3) through (9) of section 11432(e)* . . .." (Emphasis added). 42 U.S.C. § 11433(d)(1)(B).

Section 11434(b)(1), in turn, governs the responsibilities of the Secretary of Education. It states:

> The Secretary shall monitor and review compliance with the provisions of this part . . .. In reviewing the State plans submitted by the State educational agencies under section 11432(e) of this title, the Secretary shall evaluate whether State laws, policies, and practices described in such plans adequately address the problems of homeless children and homeless youth relating to access to education and placement as described in such plans.

[4/]The legislative history is somewhat unusual. The Senate did not produce a report to accompany its bill. The House produced two reports but the House bill did not contain any provision for educational services for homeless children. See 1987 U.S. Code Cong. & Admin. News 362-411. Its two reports are nevertheless useful in determining the nature and purposes of the Act.

Act was only a first, albeit important, federal step in addressing the problems of homeless persons. The Act was not expected to produce shelter for everyone in this country or to alleviate, much less eliminate, all the problems of all the homeless persons in this country. On the contrary, Congress was well aware that, even with the injection of federal resources to assist the homeless, their needs would not, and could not, fully be met.

Thus, as one House Report stated: "The resources of communities, nonprofit groups and charitable institutions are stretched to the breaking point as they attempt to provide basic shelter and essential services for the homeless." House Rep. No. 100-10(I), 100th Cong., 1st Sess., 1987 U.S. Code Cong. & Admin. News 362. That report also recognized that, "[c]onsidering the magnitude of the problem," the proposed Act was "a modest federal response." *Id.* at 366. A companion House Report, in turn, stated that the purpose of the Act was "to assist and encourage local public or private agencies to increase their efforts to meet the health needs of the homeless." House Report No. 100-10(II), 100th Cong., 1st Sess., 1987 U.S. Code & Cong. & Admin. News 400.

The House Conference Report, No. 100-174, 100th Cong., 1st Sess., 1987 U.S. Code Cong. & Admin. News 441, reiterated these points. It observed that Congress had "found an immediate and increasingly severe crisis of homelessness which demands greater resources than ha[ve] been provided by public and private organizations." *Id.* In addition, it stated:

> Indications are that the problem is not improving. The U.S. Department of Housing and Urban Development estimated that 250,000 persons were homeless in 1984. Current esti-

> mates by the National Coalition for the Homeless are that as many as 3 million individuals may be homeless. Washington city officials reported a 500 percent increase in the number of homeless families seeking shelter just this year.

Id. at 472.

In the floor debates on the compromise measure, the same themes were sounded -- the themes of too-scarce state and local resources and the need to provide some federal assistance to help deal with the rapid growth of the homeless population in this country. Thus, Senator Cranston characterized the Act as one which "lays the foundation for a national commitment to end homelessness in America." 133 Cong. Rec. 17926, 100th Cong., 1st Sess. (June 27, 1987). He also observed that the McKinney Act "gives State Governors and the mayors of major cities responsibility for developing coherent homeless assistance strategies tailored to local needs" and "would provide some additional support for . . . educational services for homeless children." Id. at 17926 & 17926-27. *See also, e.g.*, Senator Kennedy (The McKinney Act "is a downpayment by Congress on coming to grips with this problem" and "is a start but . . . only a start.") (*Id.* at 17932).

In short, the legislative history demonstrates that Congress, in passing the McKinney Act, was well aware that even with its new federal commitment, states would not have the financial resources necessary to resolve the problems of the homeless. Instead, Congress' purpose was to assist the states in tackling these problems more systematically and effectively.

III. THE TRIAL COURT.

This suit was filed by homeless parents on behalf of their children. In their complaint, they alleged that the District had violated certain rights guaranteed by the McKinney Act: (1) the statement-of-policy provisions (§ 11431(1) & (2)); (2) the provisions describing the activities for which McKinney Act funds may be used (§ 11432(c)(2) & (4)); and (3) the list of elements for which state plans must give assurances about the activities of local educational agencies to which they distribute McKinney Act funds (§ 11432(e)(3), (5), (7), (8), and (9)). Plaintiffs sought injunctive relief requiring, *inter alia*, that the District make "best interest" determinations in assigning homeless children to schools, provide transportation to and from school, and ensure that they have access to various educational and school meal programs.

The Honorable Royce C. Lamberth dismissed the complaint for failure to state a claim. He held that the McKinney Act does not confer individual rights and thus that the violations of the Act alleged are not redressable under 42 U.S.C. § 1983. App. 21a-32a. His decision was based on two central considerations. First, the McKinney Act "is basically a grant statute" pursuant to which the District receives a very modest sum of money annually -- $50,000.00 -- to assist homeless children in continuing their education. App. 22a; see App. 31a-32a. Second, and more importantly, the McKinney Act is not distinguishable from the Adoption Assistance and Child Welfare Act which, this Court held in *Suter v. Artist M.*, *supra*, does not create enforceable rights. Both statutes are, in part, "mandatory in their terms," but "both statutes only require states to submit plans or applications to be approved by the federal government." App. 30a, 31a. Because *Suter* was controlling, Judge Lamberth declined to engage in the analysis set forth in this Court's earlier decision

in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990). App. 31a n.7.[5/]

IV. THE DISTRICT OF COLUMBIA CIRCUIT.

A divided panel of the D.C. Circuit reversed. The majority (Edwards & Buckley, JJ.) characterized the McKinney Act as:

> a mix of large visions and gritty detail, combining specific sections dealing with the provision of education of homeless children and youths with a broad congressional policy that "each State educational agency . . . assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education . . .."

App. 2a, quoting 42 U.S.C. § 11431.

In its decision, the panel majority acknowledged that "[a] statute will not be deemed enforceable under section 1983 if Congress did not intend to create any enforceable rights in it . . . and where the statute 'did not create enforceable rights, privileges, or immunities within the meaning of § 1983.'" App. 5a, quoting *Wright v. Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 423 (1987). These "exceptions" to the rule of enforceable rights are, according to the panel majority, "more

---

[5/]Judge Lamberth also ruled that (1) any alleged less favorable treatment of homeless children vis-a-vis handicapped children does not violate the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution; and (2) the McKinney Act cannot be interpreted to create by implication a private right of action under *Cort v. Ash*, 422 U.S. 66 (1975), and its progeny. App. 32a-35a. Neither of these rulings was challenged on appeal.

easily stated than applied, as will be apparent from the Supreme Court's decisions" in *Wilder* and *Suter*. App. 5a.

Following a discussion of *Wilder* and *Suter*, the panel majority ruled that the *Wilder* framework was proper. Under *Wilder*, a court is required to ask whether a federal statutory provision is "intended to benefit the putative plaintiff." App. 6a. If the provision is so intended, it

> "creates an enforceable right unless it [1] reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit . . . or [2] unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce."

App. 6a, quoting *Wilder*, *supra*, 496 U.S. at 509, and omitting citations to *Pennhurst*, *supra*.

Here, the panel majority ruled, "the McKinney Act was enacted to benefit homeless children" and did not merely express a congressional preference for a certain kind of conduct. App. 10a. Thus, section 11432(c) specifies the activities for which McKinney Act grants may be used, including "*inter alia*, 'to prepare and carry out the State plan.'" App. 11a. More importantly, section 11432(e)(2) mandates that "'[e]ach plan . . . assure . . . that local educational agencies . . . will comply with'" the "highly specific instructions" contained in paragraphs (3) through (9) of subsection 11432(e). App. 11a. It was this "gritty detail" that was critical to the panel majority even though these provisions merely list the assurances states must make to the Secretary in their plans concerning the activities of local educational agencies receiving McKinney Act funds.

The statute in *Suter*, according to the panel majority, was distinguishable. First, "[a]lthough both Acts describe in detail the contents of the plan a participating State must adopt, only the McKinney Act provides specific directions for the plan's execution." App. 11a. Second, the McKinney Act "differs significantly from the Adoption Act in that paragraphs (3) through (9) of subsection 11432(e) of the McKinney Act not only inform the State in great detail on how its plan is to be implemented, they impose obligations that are independent of the plan." App. 12a. What was critical was that the McKinney Act contains "specific, mandatory terms." App. 12a.

The panel majority addressed several other matters, including the following. First, citing *Suter*, the panel majority stated that "the McKinney Act contains no statutory mechanism for the administrative enforcement of the beneficiaries' rights suggesting that Congress did not intend to [foreclose][9] a private cause of action that is enforceable under section 1983." App. 13a. Second, citing federal legislation governing the education of handicapped children, which also requires "a free, appropriate public education," the panel majority ruled that the McKinney Act provisions at issue were not so vague as to be beyond the competence of the judiciary to enforce. App. 15a.

Judge Sentelle dissented. In his view, "the genuine statutory duty of a recipient state under the McKinney Act is to 'prepare and carry out' a plan '*designed to*' achieve nine designated goals." App. 17a, quoting 42 U.S.C. §§ 11432(c)(4) & 11432(e)(1) (emphasis by Sentelle, J.). This statutory scheme is no different from that in *Suter*, which also dealt with a statute containing mandatory language and specific, detailed provisions. App. 17a. Furthermore, the "de-

---

[9]As amended on July 28, 1994.

signed to" and "best interest" language is just as amorphous as the "reasonable efforts" language considered in *Suter*. App. 17a.

REASONS FOR GRANTING THE WRIT

This Court should review the decision of the D.C. Circuit for three reasons. First, Congress has increasingly used federal grant programs to assist hard-pressed states and the District of Columbia in addressing widespread, serious, and intractable social problems. The funding provided in such programs ranges from "seed" money to nearly full funding, and the conditions for receipt of such funding range from the submission of a plan acceptable to designated federal executive branch officials to the assumption of varying obligations to beneficiaries of the legislation. The question of just what conditions accompany federal grants, and what obligations acceptance of such grants impose on the states and the District, when Congress adopts one legislative model rather than another, is thus of important, nationwide significance.

Second, the D.C. Circuit's decision in this case is in conflict with this Court's decisions in *Suter* and *Pennhurst* and is otherwise seriously flawed. In *Suter*, for example, this Court ruled that the Adoption Assistance Act, which also contains mandatory language and requires states to submit plans meeting numerous criteria, including quite specific criteria, does not create enforceable rights. By contrast, the D.C. Circuit, in the context of a modest federal assistance program, interpreted the McKinney Act by focusing on its "gritty detail" without regard to the context in which this detail is found -- *the obligation of states to give assurances* that local educational agencies to which they transmit McKinney Act funds will do certain things. Furthermore, the D.C. Circuit overlooked the fact that when Congress wants to create

an enforceable right to a free, appropriate public education, it knows how to do so, as it did in legislation aiding handicapped children.

Third, this Court needs to give guidance to the federal courts of appeals which have been struggling unsuccessfully to reconcile *Suter* and *Pennhurst* with *Wilder*. Their efforts have resulted in at least three distinct approaches for determining whether a federal grant statute creates rights enforceable under 42 U.S.C. § 1983, and two of these approaches have been criticized by judges bound by the law of their respective Circuits. This Court should clarify this important aspect of its jurisprudence to ensure that similar federal grant statutes are consistently construed and to prevent the states and the District from being subjected to financial burdens not intended by Congress, burdens that include not only the costs of entitlement programs but also attorney's fees.

I. THE DECISION OF THE D.C. CIRCUIT CONFLICTS WITH THIS COURT'S DECISIONS IN *SUTER* AND *PENNHURST*.

In *Suter* and *Pennhurst*, this Court ruled that a federal statute enacted pursuant to the Spending Clause must "unambiguously" confer rights before a beneficiary of the statute may enforce it pursuant to 42 U.S.C. § 1983. *Suter*, *supra*, 112 S. Ct. at 1366; *Pennhurst*, *supra*, 451 U.S. at 17. In *Suter* and *Pennhurst*, this Court also made clear that a federal grant statute requiring only that states submit plans acceptable to federal executive branch officials does not "unambiguously" confer rights on individuals even when the statute contains specific and detailed provisions or the language of rights.

In *Suter*, this Court ruled that the Adoption Assistance and Child Welfare Act of 1980, 94 Stat. 500, 42 U.S.C. §§

620-628, 670-679a, "does not create an enforceable right on behalf of" children "either under the Act itself or through an action under 42 U.S.C. § 1983." 112 S. Ct. at 1363. Specifically before the Court in *Suter* were two provisions of the Act, 42 U.S.C. §§ 671(a)(9) & (15), a child-abuse-and-neglect reporting provision and a provision mandating that states make "reasonable efforts" to preserve families.[7]

In *Suter*, this Court ruled that neither the reporting provision nor the "'reasonable efforts'" provision, despite their mandatory language, "unambiguously confer[s] upon the child beneficiaries of the Act a right to enforce" its requirements. *Id.* at 1367. Thus, although "the Act does place a requirement on the States, . . . that requirement only goes so far as to ensure that the State have a plan approved by the Secretary which contains . . . 16 listed features." *Id.* at 1367.

---

[7]They provided at the time of the *Suter* decision:

> In order for a State to be eligible for payments under this part, *it shall have a plan approved by the Secretary* [of Health and Human Services] which --
>
> (9) provides that where any agency of the State has reason to believe that the home . . . in which a child resides . . . is unsuitable . . . because of the neglect, abuse, or exploitation of such child, it *shall* bring such condition to the attention of the appropriate court or law enforcement agency . . .; [and]
>
> (15) . . . provides that in each case, reasonable efforts *will be made* (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home . . ..

112 S. Ct. at 1364 & 1368 n.10, quoting 42 U.S.C. § 671(a)(9) & (15) (emphasis added).

In its decision, this Court distinguished *Wilder*, which found an enforceable right, on the principal ground that the federal statute there, the Boren Amendment, required states to adopt, as part of their federally mandated plans, reasonable and adequate rates for reimbursing providers of medical services and that the providers had urged that the state's plan did not satisfy that requirement. By contrast, in *Suter*, the state plan itself was not challenged but only its implementation.

In *Suter*, this Court also distinguished *Wilder* on the ground that, in contrast to the "reasonable efforts" provision of the Adoption Assistance Act, the statute and regulations at issue in *Wilder* provided guidelines for construing the Boren Amendment's mandate that states pay reasonable and adequate rates. This distinction, however, is insignificant. First, this distinction is not applicable to the reporting provision of the Act which, this Court also ruled, does not create an enforceable right. Second, this Court in *Suter* did not appear to regard the concept of "reasonable efforts" as so vague as to preclude its application by the judiciary. Indeed, as this Court observed, in the Adoption Assistance Act, Congress directed that states be reimbursed for certain expenses on behalf of children involuntarily removed from their homes only after state family courts certify in neglect and abuse proceedings that "reasonable efforts" had been made to keep a child in his home or to return him home. 112 S. Ct. at 1368.

In light of the foregoing, the conclusion is inescapable that the dispositive rationale of *Suter* is that a federal statute does not create individual rights when all that it requires of states is the submission of a plan acceptable to federal authorities. This is so even if isolated provisions of a statute contain mandatory and specific language; these provisions must be carefully examined "in the context of the entire Act;" and it

is the context that determines a state's obligations. 112 S. Ct. at 1370.[8/]

When the language of the McKinney Act relied on by the D.C. Circuit is carefully examined in context, it is clear that the Act does not create enforceable rights. Here, as in *Suter*, the provisions principally relied upon by the D.C. Circuit (42 U.S.C. § 11432(e)(3)-(9)) are merely elements that are required to be included in a state plan pursuant to subsection (e). Under subsection (e), states receiving McKinney Act funds are required only to provide assurances in their plans that local educational entities to which they transmit federal funds will do certain things. The other provisions relied on by the D.C. Circuit are isolated parts of subsections 11432(c) & (d). Neither of these provisions, however, imposes on states obligations to individuals. Subsection (c) merely identifies the activities for which McKinney Act grants may be used, while subsection (d) merely describes the duties of state coordinators.

Wilder, moreover, does not compel a different result. Insofar as *Wilder* is relevant here, it requires two inquiries: (1) whether the McKinney Act is intended to benefit homeless children; and (2) whether, in light of *Pennhurst*, the McKinney Act "does no more than express a congressional preference for certain kinds" of conduct, rather than create binding obligations on the states, which run to and are enforceable by the beneficiaries of the Act. 451 U.S. at 19.

[8/]Assuming, however, that *Suter* can be read as a vagueness case, the District believes that the principal statutory provision invoked by plaintiffs here -- that a homeless child must be assigned to a school based on his "best interest" -- is at least as vague as the "reasonable efforts" provision which this Court in *Suter* regarded as vaguer than the reasonable rates provision at issue in *Wilder*.

Both inquiries must be answered affirmatively. Of course, the Act is intended to benefit homeless children. At the same time, however, it reflects merely a congressional preference for certain kinds of conduct -- *e.g.*, the provision of educational and related services to homeless children -- and does not impose a binding obligation on state governments, that is, an obligation that runs to each and every individual who is a member of the group Congress intended to benefit.

In *Pennhurst*, the Court explained the difference between a congressional preference and a binding obligation in rejecting the argument that the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010, conferred substantive rights on mentally retarded persons, including "a right to appropriate treatment" in the "least restrictive" environment. *Id.* at 13.[2/] In rejecting the argument of mentally retarded residents of a state hospital receiving funds under the Act that this provision, because it expressly speaks of rights, in fact creates rights, the Court wrote:

2/ The Act stated, *inter alia*:

> "Congress makes the following findings respecting *the rights* of persons with developmental disabilities:
>
> "(1) Persons with developmental disabilities have *a right to appropriate treatment, services, and habilitation for such disabilities.*
>
> "(2) The treatment, services, and habilitation for a person with developmental disabilities . . . should be provided in the setting that is *least restrictive of the person's personal liberty.*

Pennhurst, supra, 451 U.S. at 13, quoting 42 U.S.C. § 6010 (emphasis added).

> Their reliance is misplaced. "'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" . . . Contrary to [their] . . . assertion, the specific language and the legislative history of § 6010, are ambiguous. We are persuaded that § 6010, when read in the context of other more specific provisions of the Act, does no more than express a congressional preference for certain kinds of treatment. . . . *The closest one can come in giving § 6010 meaning is that it justifies and supports Congress' appropriation of money under the Act and guides the Secretary in his review of state applications for federal funds.*

Id. at 18-19 (citations omitted) (emphasis added).

Pennhurst stands for the principle that even when Congress uses the language of rights in a federal grant statute, the statute does not confer enforceable rights on the beneficiaries of the statute when the context in which this language is found indicates otherwise. The same principle applies here. Here, as in *Pennhurst*,

> nothing suggests that Congress intended the Act to be something other than a typical funding statute. Far from requiring the States to fund newly declared individual rights, the Act has a systematic focus, seeking to improve care to individuals by encouraging better state planning, coordination, and demonstration projects.

Id. at 22 (footnote omitted).

The absence of any enforceable rights in the McKinney Act is underscored by two other matters. First, the Act itself expressly contemplates that not all homeless children will receive all the benefits authorized by the Act for which they are eligible. Thus, for example, 42 U.S.C. § 11433(d)(1)(B), which, like the rest of Part B of Title VI, contains no timetable, states that an "application" from a local to a state educational agency for McKinney Act funds "shall include . . . assurances that the applicant complies with *or will use requested funds to come into compliance with paragraphs (3) through (9) of section 11432(e)* . . .." (Emphasis added). See also 42 U.S.C. § 11433(b)(2)(D) (placing limits on the extent to which McKinney Act money may be used to fund transportation of homeless children to and from school even though such limits may preclude the provision of transportation to all eligible children).

Second, the language of the McKinney Act differs in important respects from the language of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. The IDEA, originally enacted in 1975 as the Education for the Handicapped Act, like the McKinney Act, states that it is intended to ensure a "free appropriate public education" for designated children. 20 U.S.C. § 1400(c). Furthermore, as in the McKinney Act, states participate in the IDEA program by accepting federal funds after submission of a plan acceptable to the Secretary of Education. 20 U.S.C. §§ 1412 & 1413. But there the similarity ends. The IDEA provides that states "shall establish and maintain procedures" elsewhere specified in the Act "to assure that handicapped children . . . are guaranteed procedural safeguards with respect to the provision of a free appropriate public education . . .." 20

U.S.C. § 1415(a).[10/] The IDEA also requires states to identify handicapped children within their jurisdiction and to develop for each of them an individualized education program ("IEP"). 20 U.S.C. § 1415(b)(1). If a parent objects to the IEP, the IDEA requires a due process hearing before an impartial administrative agency. 20 U.S.C. § 1415(b)(2) & (c). Any party aggrieved by the decision may then seek judicial review. 20 U.S.C. § 1415(e)(2).

In the IDEA, Congress unambiguously created enforceable rights. *See, e.g., Smith v. Robinson*, 468 U.S. 992, 1010 (1984) ("Congress made clear that the [IDEA] . . . is not simply a funding statute" but that it "establishes an enforceable substantive right to a free appropriate public education"); *Hendrick Hudson Dist. Bd. of Education v. Rowley*, 458 U.S. 176 (1982). By contrast, in the McKinney Act, Congress, although it had before it an obvious model of how to create an enforceable right to a free, appropriate public education, did not adopt the language of the IDEA. Congress' failure to follow this model is powerful evidence that it had a different program and a different enforcement scheme in mind when it enacted Part B of Title VII of the McKinney Act -- a federal funding program to assist states in their efforts to provide educational and related benefits to homeless children in which state compliance is to be monitored only by the Secretary of

---

[10/]Congress did provide for an individual administrative enforcement mechanism in the McKinney Act but, in contrast to the IDEA, left its design to the states, a decision that supports the argument that the Act creates no enforceable rights. 42 U.S.C. § 14432(e)(1)(B) provides:

> Each State shall adopt a plan to provide for the education of each homeless child . . . which will contain provisions designed to . . . provide procedures for the prompt resolution of disputes regarding the educational placement of homeless children . . ..

Education. As this Court stated in *Pennhurst*, "in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly." 451 U.S. at 17-18.

In short, *Suter* and *Pennhurst* establish that a duty on the part of a state to use federal funds to assist the beneficiaries of a federal statute does not constitute an obligation that runs to each and every beneficiary of the statute. Here, as in *Suter* and *Pennhurst*, it would be wrong to construe modest Spending Clause legislation as providing guarantees specifically enforceable by individuals. The McKinney Act, like the legislation construed in *Suter* and *Pennhurst*, constitutes a modest federal response to a serious social problem which has outstripped the resources of the states and the District; it should not be interpreted as creating enforceable individual rights in the absence of unambiguous language. Indeed, here, this Court's "common sense" admonition in *Pennhurst* (451 U.S. at 24) -- that when Congress does impose affirmative obligations on the states, it usually makes a very substantial contribution to defray costs -- is particularly relevant. The modest sum of money the District receives annually under Part B of Title VI of the McKinney Act is woefully inadequate to cover its potential liability to homeless children for educational and related services should Part B be interpreted as an entitlement program. The disparity between the District's federal benefit and its potential liability itself suggests that no entitlement program was intended by Congress here.

II. THE LOWER FEDERAL COURTS EMPLOY CONFLICTING APPROACHES IN CONSTRUING FEDERAL GRANT STATUTES.

Since this Court's decision in *Suter*, the lower federal courts have questioned whether this Court continues to sub-

scribe to the analytical framework of *Wilder*. *See*, *e.g.*, *Resident Council of Allen Parkway Village v. HUD*, 980 F.2d 1043, 1051 (5th Cir.) (*Suter* "calls into question the continued viability of the framework set forth in *Wilder*."), *cert. denied*, 114 S. Ct. 75 (1993); *Stowell v. Ives*, 976 F.2d 65, 68 (1st Cir. 1992) (With *Suter*, "the old [*Wilder*] regime fell on hard times."); *Clifton v. Schafer*, 969 F.2d 278, 284 (7th Cir. 1992) (following analytical approach of *Suter*, not that of *Wilder*).

Despite their uncertainty whether *Suter* may have altered the analytical framework of *Wilder*, without overruling *Wilder*, the federal courts of appeals, mindful that this Court in *Suter* preserved the result in *Wilder*, have attempted to reconcile the two decisions. Their efforts, however, have produced conflicting analytical approaches among the Circuits and intra-Circuit disagreements, results that underscore the need for this Court to clarify this important aspect of the law.

The Seventh Circuit has ruled that, after *Suter*, a court must focus on the nature, not the specificity and detail, of the obligation Congress has imposed on the states in legislation enacted under the Spending Clause. *Clifton v. Schafer, supra*, 969 F.2d at 284. Thus, if as in that case, the only obligation imposed on states under a federal grant statute is the submission of a plan acceptable to federal executive branch officials, that statute does not permit private enforcement of the plan even if the statute contains detailed language.

The First Circuit, in turn, has focused on the locus of responsibility for compliance with a federal grant statute. As it explained in *Stowell v. Ives*, *supra*, "*Suter* instructs that, when a provision in a statute fails to impose a direct obligation on the States, instead placing the onus of compliance with the statute's substantive provisions on the federal government,

no cause of action cognizable under section 1983 can flourish." 976 F.2d at 70.

Third, the D.C. Circuit, like the Sixth Circuit, has focused on whether a federal grant statute contains "gritty detail." App. 2a. If such a statute contains mandatory language and specific directives, it creates a right enforceable under 42 U.S.C. § 1983 irrespective of the context in which the "gritty detail" appears.

Thus, the basic conditions that states must meet to secure McKinney Act funds are two-fold. First, states must "adopt *a plan* to provide for the education of each homeless child . . . within the State which will contain provisions *designed to*" achieve nine goals. 42 U.S.C. § 11432(e)(1). Second, "[e]ach plan . . . shall assure, to the extent practicable under requirements relating to education established by State law, that local educational agencies within the State will comply with the requirements of paragraphs (3) through (9)." 42 U.S.C. § 11432(e)(2). What the D.C. Circuit did was to read paragraphs (e)(3) through (e)(9), which simply lists those matters for which states must give assurances, as if they were addressed to the states themselves and as if they were independent of paragraphs (1) and (2) of subsection 11432(e).

Similarly, the Sixth Circuit, in *Horn by Parks v. Madison County Fiscal Court*, 22 F.3d 653 (6th Cir. 1994), *petition for a writ of certiorari pending*, No. 94-164, ruled that a federal juvenile justice statute, which provides modest federal funds to states which submit plans designed to improve their juvenile justice systems, creates individual rights enforceable in a section 1983 action. In its decision, the majority did not focus on the nature of the obligation imposed on states by the legislation -- the submission of a plan acceptable to the Department of Justice. Instead, its decision turned on the fact

Department of Justice. Instead, its decision turned on the fact that the legislation contained mandatory and specific language in the provisions of the statute setting forth requirements for acceptable state plans.

The conflicting approaches among the Circuits have been accompanied by intra-Circuit disagreements. Thus, for example, in *Procopio v. Johnson*, 994 F.2d 325 (7th Cir. 1993), the panel, without noting that *Suter* involved two distinct statutory provisions, including one which is quite specific, suggested that *Clifton v. Schafer*, *supra*, had misread *Suter* by not understanding that it turned on vagueness. The panel nevertheless ruled that the statute before it could not be enforced in a section 1983 action because, "[f]or better or worse," *Clifton* is the law of the Circuit. *Id.* at 332. As another example, a divided panel of the Sixth Circuit in *Wood v. Tompkins*, 1994 U.S. App. LEXIS 23498 (August 29, 1994), took the "gritty detail" approach using the *Wilder* analytic framework while purporting to follow the approach of the First Circuit which another panel of the Sixth Circuit had previously adopted. Noting that it was bound by Circuit precedent, the majority wrote that were it not, it "would prefer to avoid the seemingly artificial distinction created by the First Circuit's *Stowell* opinion between statutes that place the 'onus of compliance' directly upon the Secretary and those that place a direct obligation on the states" and it "would decline to adopt such an impermissibly truncated mode of analysis." Slip Op. at 26 n.18 & 26.

This Court should resolve these conflicting approaches and disagreements concerning the meaning of *Suter*, and, in light of *Suter*, it should modify the *Wilder* analytic approach. Among other matters, this Court should reject the approach of the D.C. Circuit here and the Sixth Circuit in *Horn* as flatly in conflict with *Suter*. Any "gritty detail" in a federal grant

statute must be interpreted in context; and if the context demonstrates that the only obligation imposed on states is to submit a plan acceptable to federal executive branch authorities, no right of action lies under 42 U.S.C. § 1983. Furthermore, it should rule that a presumption of an enforceable right does not arise whenever a beneficiary of a federal grant program seeks benefits under that program in court.

CONCLUSION

This case raises an important and constantly recurring issue that has been wrongly decided by the D.C. Circuit and that should be resolved by this Court. This Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

VANESSA RUIZ
Corporation Counsel

CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division

DONNA M. MURASKY*
Assistant Corporation Counsel

Office of the Corporation Counsel
One Judiciary Square - Sixth Floor
441 Fourth Street, N.W.
Washington, D.C. 20001
Telephone: (202) 727-6252 ext. 3303

*Counsel of Record

(2)

Supreme Court, U.S.
FILED

94 578 SEP 28 1994

OFFICE OF THE CLERK

No. 94-

In the Supreme Court of the United States

OCTOBER TERM, 1994

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

BRENDA LAMPKIN, AS LEGAL GUARDIAN OF JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, *et al.*,
Respondents.

Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

VANESSA RUIZ,
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

*DONNA M. MURASKY,
Assistant Corporation Counsel

Office of the Corporation Counsel
One Judiciary Square — Sixth Floor
441 Fourth Street, N.W.
Washington, D.C. 20001
Telephone: (202) 727-6252 ext. 3303

**Counsel of Record*

54pp

TABLE OF CONTENTS

	Page
Opinion of the United States Court of Appeals for the District of Columbia Circuit (July 1, 1994)	1a
Judgment of the United States Court of Appeals for the District of Columbia Circuit (July 1, 1994)	19a
Memorandum Opinion of the United States District Court for the District of Columbia (June 9, 1992)	21a
Order of the United States District Court for the District of Columbia (June 9, 1992)	36a
42 U.S.C. § 11431	37a
42 U.S.C. § 11432	37a
42 U.S.C. § 11433	44a
42 U.S.C. § 11434	49a
42 U.S.C. § 11435	52a

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 21, 1993 Decided July 1, 1994

No. 92-7143

BRENDA LAMPKIN, AS LEGAL GUARDIAN OF JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, ET AL., APPELLANTS

v.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia (D.D.C. No. 92cv00910)

Kerrie C. Dent argued the cause for appellants. With him on the briefs were *James D. Miller*, *Maria Foscarinis*, and *Arthur B. Spitzer*.

Donna M. Murasky, Assistant Corporation Counsel for the District of Columbia, argued the cause for appellees. With her on the brief were *John Payton*, Corporation Counsel,

---

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Charles L. Reischel, Deputy Corporation Counsel, and *Lutz Alexander Prager*, Assistant Deputy Corporation Counsel.

Deborah E. Greenspan and *Gary Thompson* were on the brief for *amici curiae* U.S. Representatives Thomas Foglietta, George Miller, Tom Lantos, Louise Slaughter, and Jolene Unsoeld.

Before EDWARDS, BUCKLEY, and SENTELLE, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

Dissenting opinion filed by *Circuit Judge* SENTELLE.

BUCKLEY, *Circuit Judge*: Parents of homeless children residing in the District of Columbia seek to invoke 42 U.S.C. § 1983 to enforce provisions of the Stewart B. McKinney Homeless Assistance Act. Concluding that the McKinney Act does not confer enforceable educational rights on homeless children, the district court granted the District of Columbia's motion to dismiss. Because we disagree with the district court's interpretation of the governing Supreme Court case law, we reverse and remand for further proceedings.

I. INTRODUCTION

The McKinney Act, Pub. L. No. 100–77, 101 Stat. 482 (codified as amended at 42 U.S.C.A. §§ 11301 *et seq.* (West Supp. 1993)), was passed in 1987 in response to "the critically urgent needs of the homeless," 42 U.S.C. § 11301(b)(2) (1988), including the proper education of their children. 42 U.S.C. §§ 11431–35 (Supp. IV 1992). The Act is a mix of large visions and gritty detail, combining specific sections dealing with the provision of education to homeless children and youths with a broad congressional policy that "each State educational agency ... assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education ... [and that] homelessness alone ... not be sufficient reason to separate students from the mainstream school environment." *Id.* § 11431.

To achieve this goal, the Secretary of Education is empowered to grant funds to States participating in the programs

authorized by the McKinney Act. 42 U.S.C. § 11432(a) (1988). Grants may be used, among other purposes, to "establish or designate an Office of Coordinator of Education of Homeless Children and Youth" and to "prepare and carry out the State plan described in subsection (e) of this section." 42 U.S.C. § 11432(c)(3) & (4) (Supp. IV 1992). Subsection (d) defines the functions of the Coordinator, which include the duty to "develop and carry out the State plan" and to "facilitate coordination" between state agencies and others providing assistance to homeless children and their families. *Id.* § 11432(d)(2) & (4).

Subsection (e), which is captioned "State plan," consists of nine paragraphs that may be divided into three parts. The first consists of paragraph (1) and its nine subparagraphs. These describe in general terms the concerns that are to be addressed by the plan: e.g., establishment of procedures for the resolution of disputes regarding the educational placement of homeless children and youths, assurance of their ability to participate in food programs, and undertaking to protect them from being isolated or stigmatized. *Id.* § 11432(e)(1)(A)-(I). The second part, paragraph (2), requires that the state plan assure, to the extent feasible under state law, "that local educational agencies within the State will comply with the requirements of paragraphs (3) through (9)." *Id.* § 11432(e)(2).

Paragraphs (3) through (9), which comprise the third part of subsection (e), are devoted to the "gritty details"—the specific means by which the educational, health, and other needs of the Act's beneficiaries will be addressed. To cite three examples that are germane here, paragraphs (3), (5), and (7) read in relevant part as follows:

> (3)(A) The local educational agency of each homeless child and each homeless youth shall either—
>
> (i) continue the child's or youth's education in the school of origin—
>
> (I) for the remainder of the academic year; or

(II) in any case in which a family becomes homeless between academic years, for the following academic year; or

(ii) enroll the child or youth in any school that nonhomeless students who live in the attendance area in which the child or youth is actually living are eligible to attend;

whichever is in the child's best interest or the youth's best interest.

(B) In determining the best interests of the child or youth for purposes of making a school assignment under subparagraph (A), consideration shall be given to a request made by a parent regarding school selection.

. . .

(5) Each homeless child shall be provided services comparable to services offered to other students in the school selected according to the provisions of paragraph (3), including transportation services . . .; and school meals programs.

. . .

(7) Each local educational agency serving homeless children or youth that receives assistance under this subchapter shall coordinate with local social services agencies, and other agencies or programs providing services to such children or youth and their families.

Id. § 11432(e)(3), (5) & (7).

Appellants here are homeless children living in the District of Columbia, which is deemed a State for purposes of the McKinney Act. 42 U.S.C. § 11421(d) (1988). They filed this action in the district court pursuant to 42 U.S.C. § 1983 (1988), which provides a cause of action against persons who infringe upon federal constitutional or statutory rights while acting "under color" of state law. Appellants allege that the District has violated section 11432(e)(3), (5), (7), (8) and (9), as

well as sections 11431(1), (2) and 11432(c)(2), (4). They seek an order requiring, among other things, that the District consider parents' requests and make "best interests" determinations when placing homeless children in schools; that it assure homeless children the transportation necessary to attend those schools; and that it ensure them access to various educational and school meal programs, and other services.

The district court found that the McKinney Act did not create an enforceable right of action under section 1983 and dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. *Lampkin v. District of Columbia*, Civ. No. 92–0910, slip op. at 14–15 (D.D.C. June 9, 1992). Thus the sole question before us on appeal is whether the homeless children can enforce the relevant provisions of the McKinney Act pursuant to section 1983, a question we answer in the affirmative.

II. Discussion

Since 1980, the Supreme Court has recognized that section 1983 may be invoked to challenge violations of federal statutes. *Maine v. Thiboutot*, 448 U.S. 1, 6–8 (1980). This rule has its exceptions: A statute will not be deemed enforceable under section 1983 if Congress did not intend to create any enforceable rights in it (which may be evidenced by the provision of a comprehensive remedial scheme in the statute itself) and where the statute "did not create enforceable rights, privileges, or immunities within the meaning of § 1983." *Wright v. Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 423 (1987). These exceptions are more easily stated than applied, as will be apparent from the Supreme Court's recent decisions in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), and *Suter v. Artist M.*, 112 S. Ct. 1360 (1992).

A. *Wilder v. Virginia Hospital Association*

In *Wilder*, the plaintiffs challenged the method by which the State of Virginia reimbursed health care providers under

the Medicaid Act, 42 U.S.C. § 1396 *et seq.* (1988). In particular, the Court faced the question

> whether the Boren Amendment to the Act, which requires reimbursement according to rates that a "State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities," is enforceable in an action pursuant to § 1983.

Wilder, 496 U.S. at 501–02 (quoting 42 U.S.C. § 1396a(a)(13)(A)).

Drawing on its decision in *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989), the Court established a test to determine whether a statutory provision creates a federal right enforceable under section 1983. First, the provision must have been intended to benefit the putative plaintiff. *Wilder*, 496 U.S. at 509. If it was so intended,

> the provision creates an enforceable right unless it [1] reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit ... or [2] unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.

Id. (internal quotation marks and citations omitted). Once it has been determined that an enforceable right exists, the statute must be examined to determine whether "Congress has foreclosed such enforcement of the statute in the enactment itself." *Wright*, 479 U.S. at 423. In applying this test to the Boren Amendment, the Court stated that there was little doubt that health care providers were its intended beneficiaries. *Wilder*, 496 U.S. at 510. The Court then reasoned that as the amendment was "cast in mandatory rather than precatory terms," it "imposes a binding obligation on States participating in the Medicaid program to adopt reasonable and adequate rates and ... is enforceable under § 1983 by health care providers." *Id.* at 512.

This interpretation, which gives substantive teeth to the reimbursement provision contained in the Medicaid Act, was criticized by the dissenting justices. *See id.*, 496 U.S. at 524 (Rehnquist, C.J., dissenting, joined by O'Connor, Scalia, and Kennedy, JJ.). The dissenters agreed that a signatory State was obligated to follow a particular process in providing *some* level of reimbursement to health care providers but concluded that the exact level of reimbursement was left to the discretion of the States. *Id.* at 527–28. The majority disagreed, holding that "the only plausible interpretation of the amendment is that by requiring a State to *find* that its rates are reasonable and adequate, the statute imposes the concomitant obligation to adopt reasonable and adequate rates." *Id.* at 514–15 (emphasis in original). The majority also rejected the argument that the obligation imposed by the amendment was too "vague and amorphous" to be judicially enforceable. *Id.* at 519. Citing the guidance set forth in the statute and accompanying regulations, including "the objective benchmark of an 'efficiently and economically operated facility' providing care in compliance with federal and state standards while at the same time ensuring 'reasonable access' to eligible participants," the majority concluded that while the statute grants the States "substantial discretion," it does not foreclose judicial review. *Id.*

Turning to the second prong of the inquiry, the majority concluded that Congress had not foreclosed enforcement of the Medicaid Act under section 1983. It found that "the Act [did] not expressly preclude resort to § 1983"; nor did it "create[ ] a remedial scheme that is 'sufficiently comprehensive ... to demonstrate congressional intent to preclude the remedy of suits under § 1983.' " *Id.* at 521 (quoting *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981)). In the eyes of the Court, the Act's grant of authority to the Secretary of Health and Human Services "to withhold approval of plans" or "to curtail federal funds to States whose plans are not in compliance with the Act" was not "sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983." *Id.* at 521–22.

B. *Suter v. Artist M.*

Two years later, the Court again addressed the availability of the section 1983 remedy. In *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), the Court was called upon to determine whether a provision of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620–28, 670–79a (1988), could be enforced under section 1983. Under the Child Welfare Act, States seeking federal reimbursement of "a percentage of foster care and adoption assistance payments" "must submit a plan to the Secretary of Health and Human Services for approval." *Suter*, 112 S. Ct. at 1363. To be approved, a plan must meet sixteen requirements, the following among them:

> [I]n each case, *reasonable efforts* will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home....

Id. at 1364 (quoting 42 U.S.C. § 671(a)(15) (emphasis added)). In *Suter*, the plaintiffs sought to use section 1983 as the procedural vehicle to obtain substantive enforcement of this "reasonable efforts" provision.

In examining the nature of the obligations created by the Child Welfare Act, the Court observed that

> [t]he legitimacy of Congress' power to legislate under the spending power ... rests on whether the State voluntarily and knowingly accepts the terms of the "contract." ... [I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

Id. at 1366 (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). Thus the critical inquiry in *Suter* was whether, "in light of the entire legislative enactment," the Child Welfare Act "unambiguously confer[red] upon [its] beneficiaries ... a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family." *Id.* at 1367.

The Court began its inquiry with the statutory language—"reasonable efforts will be made"—and noted that it was

"mandatory in its terms." *Id.* at 1367. Nonetheless, the Court's central focus was on what action was required of a State in exchange for the grant of federal funds:

> Here, the terms of § 671(a) are clear: "In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary." Therefore the [Child Welfare] Act does place a requirement on the States, but that requirement only goes so far as to ensure that the State have a plan approved by the Secretary which contains the 16 listed features.

Id. (footnote omitted). Because the State's sole obligation was to submit a plan for the Secretary's approval, the Court concluded that section 1983 could not be invoked.

In so holding, the Court emphasized that each statute is to be interpreted on its own terms. *Id.* at 1367 n.8 ("our holding today ... merely counsels that each statute must be interpreted by its own terms."). The Court distinguished *Wilder* on the grounds that

> in that case we held that the Boren Amendment actually required the States to adopt reasonable and adequate rates, and that this obligation was enforceable by the [health care] providers. We relied in part on the fact that the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates.

Id. at 1368. The Court then contrasted the Child Welfare Act, where "[n]o further statutory guidance is found as to how 'reasonable efforts' are to be measured." *Id.* Similarly, no regulatory provision evidenced "any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary." *Id.* at 1369 (footnote omitted). The Court thus concluded that the directive to use reasonable efforts was so open-ended, and the resulting state discretion so broad, that judicial enforcement was an impossibility.

In foreclosing private enforcement of the Child Welfare Act's "reasonable efforts" clause, the Court noted that the Act

contained alternative mechanisms for its enforcement. These included the provisions, in subsection 671(b), that allowed the Secretary

> to reduce or eliminate payments to a State on finding that the State's plan no longer complies with § 671(a) or that "there is a substantial failure" in the administration of a plan such that the State is not complying with its own plan.

Id. at 1368. The Court also referred to a provision conditioning federal reimbursement of foster care payments made with respect to a child involuntarily removed from his home on " 'a judicial determination to the effect that continuation [in the child's home] would be contrary to the welfare of such child.' " *Id.* (quoting 42 U.S.C. § 672(a)(1)). The Court concluded from these provisions that "the absence of a remedy to private plaintiffs under § 1983 does not make the reasonable efforts clause a dead letter." *Id.* at 1369 (footnote omitted).

C. Private Enforcement of the McKinney Act

In applying this jurisprudence to the McKinney Act, the first question to ask is whether the statute was intended to benefit persons such as appellants' children. *See Wilder,* 496 U.S. at 509; *Suter,* 112 S. Ct. at 1367. This point is not in dispute here: The parties all agree that the McKinney Act was enacted to benefit homeless children. *See* 42 U.S.C. § 11431. That said, we must hold that the Act "creates an enforceable right *unless* it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit." *Wilder,* 496 U.S. at 509 (citation and internal quotation marks omitted; emphasis added). Mindful of the need "to analyze the statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question create[s] enforceable rights, privileges, or immunities within the meaning of § 1983," *Suter,* 112 S. Ct. at 1367 (internal quotation marks omitted), we must determine whether the Act creates rights that are substantively enforceable under section 1983.

Section 11432(f) of the McKinney Act provides:

> No State may receive a grant under this section unless the state educational agency submits an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require.

42 U.S.C. § 11432(f) (1988). The regulations issued by the Secretary stipulate that a State may not begin to obligate funds received pursuant to a federal grant until the later of the two following dates: "[t]he date that the State plan is mailed or hand delivered to the Secretary in substantially approvable form" and "[t]he date that the funds are first available for obligation by the Secretary." 34 C.F.R. § 76.703(a)(1) & (2). The regulations further stipulate that a State

> shall comply with the State plan and applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, plan, and applications.

Id. at § 76.700. Here, of course, the "applicable statute[ ]" is the McKinney Act, and the obligations it imposes on participating States are clear. The Act requires that grants provided by the Secretary be used, *inter alia*, "to prepare and carry out the State plan," 42 U.S.C. § 11432(c)(4), and that "[e]ach plan ... assure ... that local educational agencies within the State will comply with the requirements of paragraphs (3) through (9)," *id.* at § 11432(e)(2). Paragraphs (3) through (9) in turn provide highly specific instructions for meeting a variety of needs of homeless children and youths. This structure markedly contrasts with that of the Child Welfare Act, with which the *Suter* Court was concerned. Although both Acts describe in detail the contents of the plan a participating State must adopt, only the McKinney Act provides specific directions for the plan's execution. *Compare* 42 U.S.C. § 671(a) *with* 42 U.S.C. § 11432(e). It is this distinction that is ignored by our dissenting colleague, who concludes that "the genuine statutory duty of a recipient state under the McKinney Act is to prepare and carry out a plan, *designed to* achieve nine designated goals." Dissent at 2 (internal quotation marks omitted, emphasis in original).

While we agree that the McKinney Act requires the State to submit such a plan, it also differs significantly from the Adoption Act in that paragraphs (3) through (9) of subsection 11432(e) of the McKinney Act not only inform the State in great detail on how its plan is to be implemented, they impose obligations that are independent of the plan. These are set forth in specific, mandatory terms; and it is these that appellants seek to enforce. Thus, paragraph (3) requires that

> [t]he local educational agency of each homeless child and each homeless youth *shall* [assign the child or youth to a school which] is in the child's best interest or the youth's best interest.... In determining the best interests of the child or youth ... consideration *shall* be given to a request made by a parent regarding school selection.

Id. § 11432(e)(3) (emphasis added). Succeeding paragraphs stipulate that "[e]ach homeless child *shall* be provided services comparable to services offered to other students in the school ...," *id.* § 11432(e)(5) (emphasis added), and that records ordinarily kept by the school "*shall* be maintained" so as to be available when the child enters a new school district. *Id.* § 11432(e)(6) (emphasis added). Furthermore, they provide that

> [e]ach local educational agency serving homeless children or youth that receives assistance under this subchapter *shall* coordinate with local social services agencies, and other agencies or programs providing services to such children or youth and their families[,]

id. § 11432(e)(7) (emphasis added), and "*shall* designate a homelessness liaison." *Id.* § 11432(e)(8) (emphasis added). We read this language as "mandatory rather than hortatory." This interpretation is supported by paragraph (2), which describes paragraphs (3) through (9) as "requirements" rather than options. *Id.* § 11432(e)(2).

In addition to the mandatory obligations listed in those seven paragraphs, the McKinney Act also provides that

> [t]he Coordinator of Education of Homeless Children and Youth established in each State *shall* ... once every 2 years, gather data on the number and location of home-

> less children and youth in the State ... develop and carry out the State plan ... [and] facilitate coordination between the State education agency, the State social services agency, and other agencies providing services to homeless children and youth and their families.

Id. § 11432(d). The language of these provisions is sufficiently clear to put the States on notice of the obligations they assume when they choose to accept grants made under the Act. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously" (footnote omitted)).

Moreover, as we noted earlier, the Secretary has promulgated regulations stipulating that for state-administered programs like the McKinney Act, "[a] State ... shall comply with the State plan and applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, plan, and applications." 34 C.F.R. § 76.700. *Contrast Suter*, 112 S. Ct. at 1369 (noting that the regulations accompanying the Child Welfare Act "do not evidence a view that [the statute] places any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary" (footnote omitted)). Here, the regulations merely reinforce our conclusion that States undertake well-defined obligations when they elect to accept funds under the McKinney Act.

Finally, the McKinney Act contains no statutory mechanisms for the administrative enforcement of the beneficiaries' rights, suggesting that Congress did not intend to create a private cause of action that is enforceable under section 1983. *See Suter*, 112 S. Ct. at 1368–69 (citing alternative enforcement mechanisms provided by sections 671(b) and 672(a)(1) of the Child Welfare Act as showing that "the absence of a remedy to private plaintiffs under § 1983 does not make the reasonable efforts clause a dead letter" (footnote omitted)). Thus there is nothing in the structure of the McKinney Act to suggest that its beneficiaries may not invoke section 1983 to enforce their rights under the Act.

One hurdle remains before we can declare that the rights conferred on homeless children by the Act are enforceable in federal court. Even if a statute confers rights on a beneficiary, their judicial enforcement requires that they not be overly "vague and amorphous." *Wilder*, 496 U.S. at 519 (internal quotation marks omitted). The District argues that the statutory requirement that a school be selected in accordance with the "best interests" of a homeless child is at least as vague as the "reasonable efforts" clause that the Court found too amorphous in *Suter*. *See New York v. United States*, 112 S. Ct. 2408, 2445 (1992) (Justice White, concurring in part, dissenting in part, describing *Suter* as "not permitting a § 1983 suit under a Spending Clause statute when the ostensible federal right created was too vague and amorphous").

This argument asserts, in essence, that the judiciary is incapable of determining the "best interests" of children, just as the plaintiffs in *Wilder* argued that the judiciary was incapable of determining what constitutes "reasonable and adequate" hospital rates. *See Wilder*, 496 U.S. at 519. In response, the Court observed:

> That the [Boren] [A]mendment gives the States substantial discretion in choosing among reasonable methods of calculating rates may affect the standard under which a court reviews whether the rates comply with the amendment, but it does not render the amendment unenforceable by a court. While there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act. Although some knowledge of the hospital industry might be required to evaluate a State's findings with respect to the reasonableness of its rates, such an inquiry is well within the competence of the Judiciary.

Id. at 519–20 (footnote omitted) (emphasis in original).

The obligations imposed by the McKinney Act involve, for the most part, the exercise of judgment by a local educational agency. A court, however, may discern whether the criteria

or procedures adopted by the agency are reasonably designed to aid it in making the school placement decision. Moreover, we have little doubt that the court would also have the competence to determine whether the District had complied with its obligation to assign a particular homeless child to a school that was in his best interests.

In recent years, the courts of this circuit have frequently been called upon to determine whether the District of Columbia public school system had met a comparable obligation under the Education for the Handicapped Act, 20 U.S.C. §§ 1400 *et seq.* (1988), which requires participating States to assure handicapped children of an "appropriate education." *See, e.g., Kerkam v. Superintendent, D.C. Public Schools*, 931 F.2d 84 (D.C. Cir. 1991); *Knight by Knight v. District of Columbia*, 877 F.2d 1025 (D.C. Cir. 1989). Although the criteria and procedures set forth in the Education for the Handicapped Act are more detailed than those in the McKinney Act, the ultimate determination made under that Act—that the handicapped child's education is "appropriate" to his needs—is no less vague or amorphous than the one at issue here. As in *Kerkam* and *Knight*, should a dispute arise between the educational agency and the parents of the homeless child as to whether the school to which the child has been assigned is in his best interest, a court is clearly competent to consider the testimony of opposing witnesses and to decide whether the agency's determination of the child's best interest was reasonable.

We conclude, from the foregoing, that section 11432(e)(3) of the McKinney Act confers enforceable rights on its beneficiaries and that appellants may invoke section 1983 to enforce those rights.

III. Conclusion

For the foregoing reasons, we reverse the district court's order granting the District's motion to dismiss and remand the case for further proceedings in accordance with this opinion.

So ordered.

SENTELLE, *Circuit Judge, dissenting:* I respectfully dissent from the court's conclusion that the McKinney Homeless Assistance Act, 42 U.S.C. § 11301 *et seq.* (1988), creates a federal right enforceable under 42 U.S.C. § 1983. I do so recognizing that the question is a close one, though in my mind it should not be. That is, I agree with Justice Powell that the Supreme Court in *Maine v. Thiboutot*, 448 U.S. 1 (1980), by holding "almost casually, that 42 U.S.C. § 1983 creates a cause of action for deprivations ... of any federal statutory right" distorted the Civil Rights Act far beyond any support in its then already lengthy history. 448 U.S. at 11 (Powell, J., dissenting, for himself, Chief Justice Burger and then-Justice Rehnquist). That said, I of course recognize that it is not within our compass to pick and choose which Supreme Court opinions we follow. Nonetheless, in my view, the district court reached the proper result and I would affirm.

Although the Supreme Court has counseled us that in the post-*Thiboutot* framework of § 1983 interpretation "each statute must be interpreted by its own terms," *Suter v. Artist M.*, 112 S. Ct. 1360, 1367 n.8 (1992), obviously, the high court's prior interpretations of other statutes instructs our interpretation of the present one. In *Suter*, as the majority points out today, the Supreme Court found no right enforceable under § 1983 in the Child Welfare Act. In *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), the Supreme Court did find such a right in the Boren Amendment to the Medicaid Act. The majority opinion today does a commendable job of cataloging the similarities and differences between the two cases and I will not rehash them. I do not disagree with the majority's summary of either case, only with its conclusion as to the side upon which the McKinney Act falls.

As the majority notes, the *Suter* decision was based at least in part upon the conclusion "that the [statutory] directive to use reasonable efforts was so open-ended, and the resulting state discretion so broad, that judicial enforcement was an impossibility." Maj. op. at 9. That is to say, whatever other grounds may exist for denying judicial enforcement to statutorily-created federal "rights" under § 1983, the "judicial enforcement" of such rights "requires that they not be overly

'vague and amorphous.' " Maj. op. at 14 (quoting *Wilder*, 496 U.S. at 519). Therefore, for us to undertake judicial enforcement of rights under the McKinney Act presupposes an ability by the federal courts to carry out for the recalcitrant state the duty of determining school assignments in the "best interests" of children and youths. To me this is no less vague and amorphous than the "reasonable efforts" language which the Supreme Court in *Suter* held insufficient to create such an enforceable right.

Certainly the majority is correct that in other circumstances courts must determine the "best interests" of particular children. However, the usual exercise of judicial wisdom in pursuit of the "best interests" of a particular child is just that—a particularized one. Here, the courts would be called upon to make programmatic decisions not as to the best interest of a particular child, but as to how a grant-augmented state program should be designed to meet the needs of *groups* of particularized children. The programmatic operation of a state agency is not within the judicial competence.

Finally, it appears to me that the genuine statutory duty of a recipient state under the McKinney Act is to "prepare and carry out" a plan, "*designed to*" achieve nine designated goals. 42 U.S.C. §§ 11432(c)(4) & 11432(e)(1). Given the amorphousness of the "designed to" mandate, I do not see how this differs in a controlling way from the Adoption Act construed in *Suter*. There the Court held that statute did not create a right enforceable under § 1983 because it did not "place[ ] any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary." *Suter*, 112 S. Ct. at 1369. The mandating paragraphs of the McKinney Act listed by the majority do not change this. The Adoption Act also contained descriptions of the relevant plan. Indeed, 42 U.S.C. § 671 provided a description of the required plan approximately as detailed, and with as many uses of mandatory words such as "shall" and "will," as does the McKinney Act

outlined in the majority opinion. Nonetheless, the Supreme Court held that the statute did not create a civil right enforceable under § 1983.

In my view, the district court in the present case properly deemed *Suter* rather than *Wilder* controlling. I would therefore affirm.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1993

USDC CV 92-0910

No. 92-7143

BRENDA LAMPKIN, AS LEGAL GUARDIAN OF
JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, *et al.*
Appellants,

v.

DISTRICT OF COLUMBIA,
A MUNICIPAL CORPORATION, *et al.*,
Appellees

Appeal from the United States District Court for the District of Columbia

---

BEFORE: EDWARDS, BUCKLEY and SENTELLE, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded, in accordance with the Opinion for the Court filed therein this date.

Per Curiam
For The Court:

RON GARVIN, *Clerk*

/s/ BY: Robert A. Bonner

ROBERT A. BONNER
Deputy Clerk

FILED: JULY 1, 1994

Opinion for the Court filed by Circuit Judge Buckley.

Dissenting opinion filed by Circuit Judge Sentelle.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 92-0910 (RCL)

BRENDA LAMPKIN, AS LEGAL GUARDIAN OF JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, *et al.*,
Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants.

MEMORANDUM OPINION

This matter comes before the court upon plaintiffs' motion for preliminary injunction and defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiffs in this matter are ten homeless parents[1] (who are bringing this action on behalf of their children) and the National Law Center on Homelessness and Poverty. Defendants are the District of Columbia, Sharon Pratt Kelly in her official capacity as Mayor of the District of Columbia, the District of Columbia Public Schools, and Dr. Franklin L. Smith in his official capacity as the Superintendent of the District of Columbia public school system.

Plaintiffs bring this action for declaratory and injunctive relief pursuant to section 1983 of the Civil Rights Act, 42 U.S.C. § 1983 (1981 and Supp. 1991) ("section 1983"). Plaintiffs contend that defendants have denied plaintiffs' rights under Title VI of the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. §§ 11421-11432 (Supp. 1991). For the following reasons, plaintiffs' motion for preliminary

---

[1] The ten parents are: Brenda Lampkin, Sadie Chatmon, Denise Dabney, Barbette Fribbley, Dawn Harvell, Gail Mason, Twana Robb, Maria Summers, Patricia Sumpter and Cherise Thornes.

injunction shall be denied and defendants' motion to dismiss shall be granted.

I. FACTS

In 1987, Congress passed the Stewart B. McKinney Homeless Assistance Act. 42 U.S.C. §§ 11421-11432 (Supp. 1991) ("McKinney Act" or "the Act"). The Act is based upon Congress' policy that state educational systems shall assure that homeless children have equal access to free education.[2] Title VI, Part B of the Act, entitled Education for Homeless Children and Youth, is basically a grant statute. It authorizes the Secretary of Education to grant federal funds to states so that these states can carry out the activities that are described in subsections (c), (d) and (e) of section 11432. *Id.* at § 11432(a). In the present case, the District of Columbia[3] received $50,000.00 pursuant to the Act. *See id.* at § 11432(b).

Pursuant to subsection (c) of section 11432, these funds are to be used to, among other things: carry out the policies of the Act; provide such services and activities to homeless children and youths to enable them to enroll in, attend and achieve in school; carry out the state plan (discussed *infra*); and to develop and implement programs for school personnel to heighten awareness of the specific problems that surround the education of homeless children and youth. *Id.* at § 11432(c). The relevant portions of subsection (d) state that the Coordinator of Education of Homeless Children and

---

[2] 42 U.S.C. § 11431 provides that:

> (1) each State educational agency shall assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education which would be provided to the children of a resident of a State and is consistent with the state school attendance laws;
>
> . . .
>
> (3) homelessness alone should not be sufficient reason to separate students from the mainstream school environment.

[3] The District of Columbia is considered a "state" for the purposes of Title VI of the McKinney Act. *See* 42 U.S.C. § 11421(d).

Youth shall facilitate coordination between various state agencies and shall develop relationships between various educational programs and providers to "improve the provision of comprehensive services to homeless children and homeless youths and the families of such children and youths" *Id.* at § 11432(d)(4),(5).

Most of plaintiffs' claims are based upon defendants' alleged failure to comply with subsection (e). This subsection, entitled "State Plan," states that "[e]ach State shall adopt a plan to provide for the education of each homeless child or homeless youth within the State . . . ." *Id.* at § 11432(e)(1). Among other things, each state plan must authorize the state educational agency to make the necessary determinations under this section and address the various problems that stand in the way of educating homeless children. *See Id.* at § 11432(e)(1)(A)-(I).

Subsection (e) also provides in relevant part that:

> (2) Each plan adopted under this subsection shall assure, to the extent practicable under requirements relating to education established by State law, that local educational agencies within the State shall comply with the requirements of paragraphs (3) through (9).
>
> (3)(A) The local educational agency of each homeless child and each homeless youth shall either —
>
> > (i) continue the child's or youth's education in the school of origin —
> >
> > > (I) for the remainder of the academic year; or
> >
> > > (II) in any case in which a family member becomes homeless between academic years, for the following academic year; or
> >
> > (ii) enroll the child or youth in any school that nonhomeless students who live in the attendance area in which the child or youth is actually living are eligible to attend;
>
> whichever is in the child's best interest or the youth's best interest.

> (B) In determining the best interests of the child or youth for purposes of making a school assignment under subparagraph (A), consideration shall be given to a request made by a parent regarding school selection.
>
> . . .
>
> (5) Each homeless child shall be provided services comparable to services offered to other students in the school selected according to the provisions of paragraph (3), including transportation services, educational services for which the child meets the eligibility criteria, such as compensatory educational programs for the disadvantaged, and the educational programs for the handicapped and for students with limited English proficiency; programs for vocational education; programs for the gifted and talented; and school meal programs.
>
> (7) Each local educational agency serving homeless children or youth that receives assistance under this subchapter shall coordinate with local social services agencies, and other agencies or programs providing services to such children or youth and their families.
>
> (9) Each State and local educational agency shall review and revise any policies that may act as barriers to the enrollment of homeless children and youth in schools selected in accordance with paragraph (3). In reviewing and revising such policies, consideration shall be given to issues concerning transportation, requirements of immunization, residency, birth certificates, school records, or other documentation, and guardianship. Special attention shall be given to ensuring the enrollment and attendance of homeless children and youths who are not currently attending school.

Id. at § 11432(e).

Also relevant to this case is section 11432(f) of the Act. This section provides that "[n]o State may receive a grant under this section unless the State educational agency submits an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require." *Id.* at § 11432(f). *See also id.* at § 11433(d)(1) (which provides that "[a] local educa-

tional agency that desires to receive a grant under this section shall submit an application to the State educational agency at such time, in such manner, and containing or accompanied by such information as the State agency may reasonably require according to the guidelines issued by the Secretary"). The application must include:

> (A) a description of the services and programs for which assistance is sought and the problems sought to be addressed through the provision of such services and programs;
>
> (B) assurances that the applicant complies with or will use requested funds to come into compliance with paragraphs (3) through (9) of section 11432(e) of this title;
>
> (C) an assurance that assistance under the grant will supplement and not supplant funds used before the award of the grant for purposes of providing services to homeless children and homeless youth;
>
> (D) a description of policies and procedures that the agency will implement to ensure that activities carried out by the agency will not isolate or stigmatize homeless children or homeless youth.

Id. at § 11[4]33(d)(1).

The final provision of the Act which is relevant to this case is section 11434. This section imposes various duties upon the Secretary of Education. This provision states, in relevant part, that:

> [i]n reviewing the State plans submitted by the State educational agencies under section 11432(e) of this title, the Secretary shall evaluate whether State laws, policies, and practices described in such plans adequately address the problems of homeless children and homeless youth relating to access to education and placement as described in such plans.

Id. at § 11434(b)(1).

Plaintiffs assert that defendants have failed to comply with Title VI of the McKinney Act in that defendants have: (1) failed to implement a best interest standard in placing home-

less children in schools; (2) failed to ensure transportation to and from the school that is in the best interest of homeless children to attend; (3) failed to coordinate social services and public education for homeless children, and to ensure access to comparable educational services and school meal programs; and (4) failed to provide access to free, appropriate public education for homeless children.

In addition to their section 1983 claims under the McKinney Act, plaintiffs allege that defendants violated their rights to equal protection under the Fifth Amendment to the United States Constitution. Plaintiffs state that although they are similarly situated to handicapped children in their need for transportation assistance, defendants provide transportation assistance to handicapped children and not to homeless children.

Defendants oppose plaintiffs' motion for preliminary injunction on the ground that plaintiffs are not entitled to injunctive relief. Further, in their motion to dismiss, defendants assert that plaintiffs have failed to state a claim upon which relief can be granted because plaintiffs do not have a private right of action under the McKinney Act for the relief sought and because they have failed to adequately plead an equal protection claim.

II. ANALYSIS

A. Legal Standard

Pursuant to the Federal Rules of Civil Procedure, the court may dismiss plaintiffs' claims for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). For the purposes of this motion, the court shall accept all of plaintiffs' allegations as true.

B. Section 1983

42 U.S.C. § 1983 provides a federal remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and federal laws." Section 1983 is available as a remedy for violations of federal statutes as well as for constitutional violations. *See Maine v. Thiboutot*,

448 U.S. 1 (1980). Prior to the United States Supreme Court's ruling in *Suter v. Artist M.*, —— U.S. ——, 112 S. Ct. 1360 (1992), the Court had developed a two-part line of inquiry for determining whether section 1983 provides a remedy for a statutory violation. First, since section 1983 speaks in terms of "rights, privileges or immunities," not violations of federal law, the court must determine whether plaintiff asserted a violation of a federal right. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989). The Supreme Court has recognized three basic considerations that courts should consider when finding whether plaintiffs assert a violation of a right. First, courts should consider whether the provision at issue creates a binding obligation upon the government, in which case a federal right would be created, or whether the provision does "no more than express a congressional preference for certain kinds of treatment," in which case no federal right would be created. *Id.* (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 (1981)). Second, courts should consider whether the interest is "too vague and amorphous" so that it is considered "beyond the competency of the judiciary to enforce." *Golden State*, 493 U.S. at 106 (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-32 (1987)). If so, then no federal right is created. Third, courts should consider whether the provision in question was "inten[ded] to benefit" the plaintiff. *Golden State*, 493 U.S. at 106 (quoting *Wright*, 479 U.S. at 430)). If so, then a federal right may be created.

Second, should the court find that plaintiffs have asserted a federal right, section 1983 provides a remedial cause of action "unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." *Wright*, 479 U.S. at 418. Defendants must demonstrate that Congress has "specifically foreclosed a remedy under § 1983" by providing a comprehensive enforcement mechanism to protect a federal right. *Golden State*, 493 U.S. at 106 (quoting *Smith v. Robinson*, 468 U.S. 992, 1005 n. 9 (1984)). *See also Middlesex County Sewage Authority v. National Sea Clam-*

mers Ass'n., 453 U.S. 1 (1981). The Supreme Court has stated that "[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy" for the deprivation of a federal right. *Wright*, 479 U.S. at 418-419 (quoting *Smith*, 468 U.S. at 1012)). The Court rarely finds that a remedial scheme established by Congress is sufficient to displace the remedy that is provided by § 1983.[4] *See Wilder*, 110 S. Ct. at 2523.

The availability of an administrative mechanism is not necessarily seen by the Court as sufficient to show that Congress intended to foreclose a section 1983 remedy. *Golden State*, 493 U.S. at 106 (cites omitted). Rather, a private right of action under section 1983 is foreclosed "only when the statute itself creates a remedial scheme that is 'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.' " *Wilder v. Virginia Hospital Ass'n.*, 496 U.S. 498, 110 S. Ct. 2510, 2523 (1990) (quoting *Sea Clammers*, 453 U.S. 1, 20 (1981)).

Moreover, the Court has also held that the generalized authority to cut off federal funds is "insufficient to indicate a congressional intention to foreclose § 1983 remedies." *Wright*, 479 U.S. at 428 (cites omitted). *See also Wilder*, 110.S. Ct. at 2524; *Suter*, 112 S. Ct. at 1376 (Blackmun, J., dissenting) (in which Justice Blackmun noted that "ever since *Rosado v. Wyman*, 397 U.S. 397 (1970), the power of the secretary to enforce congressional spending conditions by cutting off funds has not prevented the federal courts from enforcing the same conditions").

---

[4] In *Wilder*, the Court noted that it has found that Congress's remedial scheme was sufficient to displace section 1983 only on two occasions. In *Sea Clammers*, the Court held that the enforcement scheme that was created in the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, demonstrated congressional intent to foreclose the section 1983 remedy because it granted the Environmental Protection Agency considerable enforcement power through the use of noncompliance orders, civil suits, criminal penalties and two citizen-suit provisions. *Sea Clammers*, 453 U.S. at 13. In the other case, *Smith v. Robinson*, the Court held that the administrative scheme set forth in the Education of the Handicapped Act, which contained a "carefully tailored administrative and judicial mechanism" foreclosed section 1983 as a remedy. *Smith v. Robinson*, 468 U.S. 992, 1009 (1984).

In *Suter*, which is factually similar to the present case, the Court broke from this line of inquiry. *See Suter*, 112 S. Ct. at 1376 (Blackmun, J., dissenting).[5] The issue presented in *Suter* was whether section 1983 permits private individuals the right to enforce the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679a ("Adoption Act"). The Adoption Act established a federal reimbursement program for various expenses incurred by states in administering foster care and adoption services. *Suter*, 112 S. Ct. at 1363. The Act provided that states which satisfy the Act's requirements will be reimbursed for a percentage of foster care and adoption assistance programs. *Id.*

In order to participate in the reimbursement program, the Adoption Act required that states submit a plan to the Secretary of Health and Human Services for approval by the Secretary. *Id.* at 1363-64. The Adoption Act listed 16 qualifications that state plans must contain in order to gain the Secretary's approval. *Id.* at 1364. One of the requisite features was that "reasonable efforts will be made [by the state agency] (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." *Id.* (quoting 42 U.S.C. § 671(a)(15)).

Respondents in *Suter* filed a class-action suit seeking declaratory and injunctive relief under the Adoption [A]ct *Id.* at 1364. Respondents claimed that the state agency, in violation of the Adoption Act, "failed to make reasonable efforts to prevent removal of children from their homes and to facilitate reunification of families where removal had occurred." *Id.* (footnote omitted). The United States District Court for the Northern District of Illinois found that the Adoption Act created a right of action under section 1983. *Artist M. v. Johnson*, 726 F. Supp. 690 (N.D. Ill. 1989). The United States Court of Appeals for the Seventh Circuit, relying

---

[5] In his dissent, Justice Blackmun stated that "the Court reache[d] its conclusion without even stating, much less applying, the principles our precedents have used to determine whether a statute has created a right enforceable under § 1983." *Suter*, 112 S. Ct. at 1371.

primarily upon *Wilder*, affirmed, holding that the "reasonable efforts" clause of the Adoption Act could be enforced under section 1983. *Artist M. v. Johnson*, 917 F.2d 980 (7th Cir. 1990).

The Supreme Court reversed and held that the Adoption Act does not confer an enforceable right of action based on section 1983. *Suter*, 112 S. Ct. at 1365. The Court held that the fact that the language of 42 U.S.C. § 671(a)(15) is mandatory in its terms does not alone create a right that is enforceable under section 1983. Rather, the Court considered exactly what the Act required the states to do. *Id.* at 1367. The Court then held that the Adoption Act only required that states have their plans approved by the Secretary, meaning that their plans must contain the 16 features that are required by the statute. *Id.* The Court then recognized that Illinois' state plan was approved by the Secretary. *Id.* The Court distinguished the Adoption Act from the statute in *Wilder*, a case in which the Court found . . . an enforceable right, because the statute in *Wilder* actually required that states adopt reasonable and adequate rates.[6] *Id.* at 1368.

Title VI of the McKinney Act, Part B, closely resembles the Adoption Act in *Suter* in two ways. First, like the Adoption Act, portions of the McKinney Act are mandatory in their terms. For example, 42 U.S.C. § 11432(e)(3)(A) provides that the local educational agency "shall either — continue the child's or youth's education in the school of origin . . . or . . . enroll the child or youth in any school that nonhomeless students who live in the attendance area in which the child or youth is actually living are eligible to attend; whichever is in the child's best interest or in the youth's best interest." According to *Suter*, however, such mandatory language alone does not create a right of action under § 1983. Rather, the court must determine exactly what the McKinney Act requires defendants to do.

[6] The Court also held that the "reasonable efforts" clause in § 671(a)(15) of the Adoption Act does not confer an enforceable right upon the Adoption Act's beneficiaries, but rather "it impose[s] only a generalized duty on the State, to be enforced not by private individuals, but by the Secretary . . . ." *Suter*, 112 S. Ct. at 1368-69.

The second similarity between the McKinney Act and the Adoption Act is the fact that both statutes only require states to submit plans or applications to be approved by the federal government. Title VI of the McKinney Act authorizes the Secretary of Education to grant federal funds to state educational agencies so that these agencies may carry out the activities that are authorized in subsections (c), (d) and (e) of section 11432. 42 U.S.C. § 11432(a), (b). One of these activities is preparing and carrying out a state plan which must comply with the requirements that are set forth in subsection (e). *Id.* at § 11432(d), (e). The state plan is designed to assure that local agencies comply with the provisions that are set forth in § 11432(e)(3) through (9), the sections which contain the mandatory language that plaintiffs point to in claiming that the Act creates a private right of action. *Id.* at § 11432(e)(2).

Section 11432(f) of the McKinney Act provides that no state may receive grants under the Act unless it submits a proper application to the Secretary of Education. Such an application must, among other things, assure that the applicant will use its federal funds to come into compliance with the requirements of section 11432(e)(3)-(9). The final piece of this statutory framework is provided by section 11434. This section requires the Secretary of Education to assure that the State educational agencies' applications are proper in order for it to grant federal funds under this statute.

Thus, much like the Adoption Act in *Suter*, the McKinney Act does not confer an enforceable right upon plaintiffs.[7] Rather, the only requirement that the Act imposes upon states is the duty to submit a proper application if the state wishes to receive federal funding to educate homeless children. *See id.* at § 11432(f); § 11433(d). The only enforceable duty that the Act may impose is upon the Secretary of

[7] Due to the similarity between the McKinney Act in the present case and the Adoption Act in *Suter*, the court shall follow the analysis that the Supreme Court applied in *Suter*. Accordingly, the court does not reach . . . the issue of whether Title VI of the McKinney Act would create an enforceable right of action pursuant to section 1983 under the Supreme Court's pre-*Suter* jurisprudence.

Education. The Secretary must comply with section 11434 and review state plans as well as state laws, policies and practices to assure that the states adequately address the problems of educating homeless children before the Secretary may grant federal funds to each state. *See id.* at § 11434(b)(1).

Accordingly, like in *Suter*, the mandatory language that is cited by plaintiffs in section 11432(e)(3)-(9) does not create an enforceable right under section 1983. Rather, this language merely sets forth the criteria that the Secretary must consider when deciding whether a state's application is proper. *See id.* at § 11434(b)(1). It is then up to the Secretary to determine whether the states' applications are adequate and whether the states deserve a federal grant. *See id.* Consequently, the court shall grant defendants' motion to dismiss plaintiffs' section 1983 claims because plaintiffs have failed to state a claim upon which relief can be granted.[8]

C. Implied Right of Action

In *Suter*, after finding that the Adoption Act did not create an enforceable right of action under section 1983, the Court briefly addressed whether the Adoption Act contained an implied right of action. The Court applied the familiar test from *Cort v. Ash*, 422 U.S. 66 (1975), and held that the Adoption Act did not. In the present case, plaintiffs' statutory claims are based solely upon section 1983 and not directly under the McKinney Act. Thus the court need not address whether the McKinney Act creates an implied right of action. Even if the court were to address this issue, however, the court would conclude that the McKinney Act does not contain an implied right of action.

In *Cort*, the United States Supreme Court set forth a four-part test for determining whether a statute creates an implied right of action. The four factors are:

---

[8] Since the court shall grant defendants' motion to dismiss on the ground that plaintiffs do not have a right of action under section 1983, the court need not pass on whether defendants have actually complied with the McKinney Act.

> [f]irst, is the plaintiff one of the class for whose *especial* benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action solely on federal law?

Id. at 78 (internal quotation marks omitted; emphasis in original).

In the present case, although plaintiffs are in the class for whose benefit the statute was created, it is the judgment of the court that the second and third factors of this test have not been met. As is discussed above, given the overall scheme of Title VI of the McKinney Act and the lack of legislative history on this issue,[9] the court cannot find that Congress intended to imply a private right of action as a remedy for this statute. The only duty that Congress intended to impose was upon the Secretary of Education to grant funds only to those states which submitted a proper application.

In addition, granting an implied right of action in this case would be inconsistent with the McKinney Act's overall statutory scheme. When read in its entirety, it is evident that the Act is designed to provide federal assistance to those states that choose to provide these program to help educate homeless children. These grants are made only if the states submit a proper application and the decision to grant federal funds is left to the Secretary upon his review of the states' applications, laws and policies. Thus, according to the letter of the Act, the remedy for a state's failure to comply with its state plan lies with the Secretary of Education, not with

---

[9] The parties have not cited, and the court has not uncovered, any legislative history that is relevant to this inquiry.

parties like plaintiffs. To find an implied right of action in this case would be the equivalent of the judiciary rewriting the statute.

D. Equal Protection

The court shall also dismiss plaintiffs' equal protection claim. In *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954), the United States Supreme Court held that the equal protection guaranties that are provided in the Fourteenth Amendment to the Constitution are applicable to the District of Columbia through the equal protection component of the Due Process Clause of the Fifth Amendment. The Equal Protection Clause of the Fourteenth Amendment essentially commands that all persons that are similarly situated should be treated alike. *Cleburn v. Cleburn Living Center, Inc.*, 473 U.S. 432, 439 (1984) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). When a law is challenged on equal protection grounds, the general rule is that the law is presumed to be valid and will be sustained if the classification that is drawn by the statute is rationally related to a legitimate government interest. *Cleburn*, 473 U.S. at 440 (cites omitted). In the present case, both parties agree that education is not a fundamental right and that no suspect classes are involved. *See Kadrmas v. Dickenson Public Schools*, 487 U.S. 451, 457-58 (1988). Thus, both parties recognize that rational basis scrutiny is appropriate for evaluating this claim.

Plaintiffs assert that defendants have violated their equal protection rights because defendants refuse to provide homeless children with necessary transportation assistance to and from school but defendants do provide transportation assistance to mentally and physically handicapped children. Defendants do treat homeless children differently than handicapped children for the purposes of providing transportation assistance to and from school. The court cannot find, however, that this disparate treatment violates plaintiffs' rights to equal protection under the Fifth and Fourteenth Amendments.

Defendants are required to provide transportation assistance to handicapped children under the Education for

All Handicapped Children Act, 20 U.S.C. § 1400 *et seq*. This Act defines handicapped children as children:

> (A) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbances, orthopedic impairment, autism, traumatic brain injury, other health impairments, or special learning disabilities; and
>
> (B) who, by reason thereof need special education and related services.

Id. at § 1401(a)(1). The Act provides that transportation is a "related service" under 20 U.S.C. § 1401(a)(17).

Defendants have a rational basis for treating handicapped children differently than homeless children for the purposes of providing transportation assistance to and from school. Handicapped children, because of their disability, are by definition less able to travel to school than non-disabled children. Plaintiffs have failed to show that homeless children, by virtue of their homelessness alone, are physically or mentally less capable of travelling to school than nonhomeless children.

A separate order shall issue this date.

/s/ Royce C. Lamberth

ROYCE C. LAMBERTH
United States District Judge

DATE: JUNE 9, 1992.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 92-0910 (RCL)

BRENDA LAMPKIN, AS LEGAL GUARDIAN OF JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, *et al.*,
Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,
Defendants.

ORDER

This matter comes before the court upon plaintiffs' motion for preliminary injunction and defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated in the court's memorandum opinion of this date, it is hereby ORDERED that

1. Defendants' motion to dismiss is GRANTED.
2. Plaintiffs' motion for preliminary injunction is DENIED as moot.
3. This case stands DISMISSED WITH PREJUDICE

SO ORDERED.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

DATE: JUNE 9, 1992.

Part B—Education for Homeless Children and Youth

§ 11431. Statement of policy

It is the policy of the Congress that—

(1) each State educational agency shall assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education which would be provided to the children of a resident of a State and is consistent with the State school attendance laws;

(2) in any State that has a residency requirement as a component of its compulsory school attendance laws or other laws, regulations, practices or policies that may act as a barrier to the enrollment, attendance, or success in school of homeless children and homeless youth, the State will review and undertake steps to revise such laws to assure that the children of homeless individuals and homeless youth are afforded a free and appropriate public education.

(3) homelessness alone should not be sufficient reason to separate students from the mainstream school environment.

(Pub.L. 100-77, Title VII, § 721, July 22, 1987, 101 Stat. 525; Pub.L. 101-645, Title VI, § 612, Nov. 29, 1990, 104 Stat. 4735.)

§ 11432. Grants for State and local activites for the education of homeless children and youth

(a) General authority

The Secretary of Education is, in accordance with the provisions of this section, authorized to make grants to States to carry out the activities described in subsections (c), (d), and (e) of this section.

(b) Allocation and reservation of amounts

* * *

(c) Authorized activities

Grants under this section shall be used—

(1) to carry out the policies set forth in section 11431 of this title in the State;

(2) to provide activities for and services to homeless children and homeless youths that enable such chidlren and youths to enroll in, attend, and achieve success in school;

(3) to establish or designate an Office of Coordinator of Education of Homeless Children and Youth in accordance with subsection (d) of this section;

(4) to prepare and carry out the State plan described in subsection (e) of this section;

(5) to develop and implement programs for school personnel to heighten awareness of specific problems of the education of homeless children and youth; and

(6) if amounts appropriated for the applicable fiscal year exceed the amount appropriated for fiscal year 1990 under this section, to provide grants to local educational agencies for purposes of this section, and if such amounts appropriated do not exceed the amount appropriated for fiscal year 1991, the State education agency, at the discretion of such agency, may provide such grants.

(d) Functions of the Office of Coordinator

The Coordinator of Education of Homeless Children and Youth established in each State shall—

(1) once every 2 years, gather data on the number and location of homeless children and youth in the State, and such data gathering shall include number of homeless children and homeless youths enrolled in schools in the State, determined through random sampling or other statistical methods that ensure that such children and youths are not overtly identified as being homeless, the nature and extent of problems of access to, and placement of, homeless children and homeless youth in ele-

mentary and secondary schools, the difficulties in identifying the special needs of such chidlren, and any progress made by the State educational agency and local educational agencies within the State in addressing such problems and difficulties;

(2) develop and carry out the State plan described in subsection (e) of this section;

(3) prepare and submit to the Secretary not later than December 31, 1991, and on December 31 of every second year thereafter a report on the data gathered pursuant to paragraph (1);

(4) facilitate coordination between the State education agency, the State social services agency, and other agencies providing services to homeless children and youth and their families; and

(5) develop relationships and coordinate with other relevant education, child development, or preschool programs and providers of services to homeless children, homeless families, and runaway and homeless youths (including domestic violence agencies, shelter operators, transitional housing facilities, runaway and homeless youth centers, and transitional living programs for homeless youths) in order to improve the provision of comprehensive services to homeless children and homeless youths and the families of such children and youths.

To the extent that reliable current data is available in the State, each coordinator described in this subsection may use such data to fulfill the requirements of paragraph (1).

(e) State plan

(1) Each state shall adopt a plan to provide for the education of each homeless child or homeless youth within the State which will contain provisions designed to—

(A) authorize the State educational agency, the local educational agency, the parent or guardian of the homeless child, the homeless youth, or the applicable

social worker to make the determinations required under this section;

(B) provide procedures for the prompt resolution of disputes regarding the educational placement of homeless children and youth;

(C) develop programs for school personnel (including principals, attendance officers, teachers, and enrollment personnel), to heighten the awareness of such personnel of the specific educational needs of runaway and homeless youths; and

(D) ensure that homeless children and homeless youths who meet the relevant eligibility criteria are able to participate in Federal, State, or local food programs.

(E) ensure that homeless children and homeless youths who meet the relevant eligibility criteria are able to participate in Federal, State, or local before- and after-school care programs and provide for the disclosure of data concerning the participation of such children in such programs in plans submitted by the State after the initial plan of the State;

(F) address problems set forth in the report provided to the Secretary under subsection (d)(3) of this section;

(G) address problems with respect to the education of homeless children and homeless youths, including problems caused by—

(i) transportation issues; and

(ii) enrollment delays which are caused by—

(I) immunization requirements;

(II) residency requirements;

(III) lack of birth certificates, school records, or other documentation;

or

(IV) guardianship issues;

(H) demonstrate that the State and local educational agencies in the State have developed and will review and revise policies to remove barriers to the enrollment and

retention of homeless children and homeless youths in schools of the State; and

(I) ensure that the State educational agency and local educational agencies within the State will adopt policies and practices to ensure that homeless children and homeless youths are not isolated or stigmatized.

(2) Each plan adopted under this subsection shall assure, to the extent practicable under requirements relating to education established by State law, that local educational agencies within the State will comply with the requirements of paragraphs (3) through (9),

(3)(A) The local educational agency of each homeless child and each homeless youth shall either—

(i) continue the child's or youth's education in the school of origin—

(I) for the remainder of the academic year; or

(II) in any case in which a family becomes homeless between academic years, for the following academic year; or

(ii) enroll the child or youth in any school that nonhomeless students who live in the attendance area in which the child or youth is actually living are eligible to attend;

whichever is in the child's best interest or the youth's best interest.

(B) In determining the best interests of the child or youth for purposes of making a school assignment under subparagraph (A), consideration shall be given to a request made by a parent regarding school selection.

(C) For purposes of this paragraph, the term "school of origin" shall mean the school that the child or youth attended when permanently housed, or the school in which the child or youth was last enrolled.

(4) The choice regarding placement shall be made regardless of whether the child or youth is living with the

homeless parents or has been temporarily placed elsewhere by the parents.

(5) Each homeless child shall be provided services comparable to services offered to other students in the school selected according to the provisions of paragraph (3), including transportation services, educational services for which the child meets the eligibility criteria, such as compensatory educational programs for the disadvantaged, and educational programs for the handicapped and for students with limited English proficiency; programs in vocational education; programs for the gifted and talented; and school meals programs.

(6) Any record ordinarily kept by the school, including immunization records, academic records, birth certificates, guardianship records, and evaluations for special services or programs, of each homeless child or youth shall be maintained—

(A) so that the records are available, in a timely fashion, when a child or youth enters a new school district; and

(B) in a manner consistent with section 1232g of Title 20.

(7) Each local educational agency serving homeless children or youth that receives assistance under this subchapter shall coordinate with local social services agencies, and other agencies or programs providing services to such children or youth and their families.

(8) Each local educational agency that receives assistance under this subchapter shall designate a homelessness liaison to ensure that—

(A) homeless children and youth enroll and succeed in the schools of that agency; and

(B) homeless families, children and youth receive educational services for which they are eligible, and referrals to health care services, dental services, mental health services, and other appropriate services.

State coordinators and local educational agency liaisons shall inform school personnel, service providers and advocates working with homeless families of the duties of the liaisons.

(9) Each State and local educational agency shall review and revise any policies that may act as barriers to the enrollment of homeless children and youth in schools selected in accordance with paragraph (3). In reviewing and revising such policies, consideration shall be given to issues concerning transportation, requirements of immunization, residency, birth certificates, school records, or other documentation, and guardianship. Special attention shall be given to ensuring the enrollment and attendance of homeless children and youths who are not currently attending school.

(f) Application

No State may receive a grant under this section unless the State educational agency submits an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require.

(g) Authorization of appropriations

(1) There is authorized to be appropriated to carry out this section $50,000,000 for fiscal year 1991, and such sums as may be necessary for each of the fiscal years 1992 and 1993.

(2) The State educational agency may reserve not to exceed 5 percent of the amount received by such agency under this section in each fiscal year, or an amount equal to the amount received by such State agency for State activities under this section in fiscal year 1990, whichever is greater, to conduct activities under paragraphs (1) through (5) of subsection (c) of this section.

(3)(A) In any fiscal year in which the amount appropriated under paragraph (1) does not equal or exceed $100,000,000, the State educational agency shall use funds not otherwise reserved under paragraph (2) to award grants to local educational agencies in accordance with subsection (c)(6) of this section.

(B) In any fiscal year in which the amount appropriated under paragraph (1) equals or exceeds $100,000,000, the State educational agency shall use funds not otherwise reserved under paragraph (2) to allocate to each local educational agency an amount that bears the same ratio to amount not otherwise reserved as the aggregate amount received by such local educational agency under part A of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 2711 et seq.] for such fiscal year bears to the aggregate amount received by all local educational agencies in the State for purposes of carrying out such part for such fiscal year.

(4) Sums appropriated in each fiscal year shall remain available for the succeeding fiscal year.

(Pub.L. 100-77, Title VII, § 722, July 22, 1987, 101 Stat. 525, amended Pub.L. 100-628, Title VII, § 702(a), Nov. 7, 1988, 102 Stat. 3245; Pub.L. 101-625, Title VI, § 612(b), Nov. 29, 1990, 104 Stat. 4735.)

§ 11433. Local educational agency grants for the education of homeless children and youth

(a) General authority

(1) Grantees and purpose of grants

The State educational agency shall, in accordance with section 11432(c)(6) of this title and from amounts made available to such agency under section 11432 of this title, make grants to local educational agencies for the purpose of facilitating the enrollment, attendance and success of homeless children and youths in schools.

(2) Use of grants

Unless otherwise specified, services under paragraph (1) may be provided through programs on school grounds or at other nonsectarian facilities. Where services are provided through programs on school grounds, such services may also be made available to children or youths who are determined by the local educational agency to be at risk of failing in or dropping out of schools, except that priori-

ty for such services shall be given to homeless children and homeless youths. To the maximum extent practicable, services shall be provided though existing programs and mechanisms that integrate homeless individuals with nonhomeless individuals.

(3) Regular academic program

Services provided under his section are not intended to replace the regular academic program.

(b) Authorized activities

(1) Primary activities

Not less than 50 percent of amounts provided under a grant under this section shall be used to provide tutoring, remedial education services, or other education services to homeless children or homeless youths.

(2) Related activities

Not less than 35, nor more than 50, percent of the amounts provided under a grant under this section may be used for activities that may include—

(A) the provision of expedited evaluations of the strengths and needs of homeless children and homeless youths, including needs and eligibility for programs and services (including gifted and talented programs, special education programs, programs for students with limited English proficiency, and remedial services);

(B) professional development for educators and other school personnel that is designed to develop awareness and sensitivity to the needs of homeless children and homeless youths and rights of such children and youths under this chapter;

(C) the provision of referral services to homeless children and homeless youths for medical, dental, mental, and other health services;

(D) the provision of assistance to defray the excess cost of transportation for students not provided under section 11432(e)(5) of this title and not otherwise provided through Federal, State, or local fund-

ing, where necessary to enable students to attend the school selected under section 11432(e)(3) of this title;

(E) the provision of developmentally appropriate early childhood programs for preschool age children;

(F) the provision of before- and after-school and summer programs for homeless children or homeless youths in which a teacher or other qualified individual provides tutoring, homework assistance, and supervision of educational activities;

(G) where necessary, the payment of fees and other costs asssociated with tracking, obtaining, and transferring records necessary to enroll homeless children or homeless youths in school, including birth certificates, immunization records, academic records, guardianship records, and evaluations for special programs or servcies;

(H) the provision of parent education and training to the parents of homeless children and homeless youths about the rights of and resources available to such children and youths;

(I) the development of coordination between schools and agencies providing services to homeless children and homeless youths;

(J) the provision of counseling, social work and psychological services, including violence counseling, and referrals for such services;

(K) activities to address the particular needs of homeless children and homeless youths that may arise from domestic violence;

(L) activities to develop and implement programs for school personnel to heighten the awareness of such personnel of the specific educational needs of runaway and homeless youths;

(M) the adaptation of space and the purchase of supplies for nonschool facilities made available under subsection (a)(2) of this section to provide services under this subsection;

(N) the provision of school supplies to be distributed at the shelter or temporary housing facilities; and

(O) the provision of such other extraordinary or emergency assistance determined by the Secretary as essential to enable homeless children and youth to attend school.

(3) Eligibility

No State or local educational agency may receive a grant under this section unless the State in which the agency is located has submitted a State plan as required by section 11432(e) of this title.

(c) Awards

(1) Basis

Except as provided in section 11432(g)(3)(B) of this title; from amounts appropriated for each fiscal year under section 11432(g) of this title, the State educational agency may award grants under this section to local educational agencies submitting an application under subsection (d) of this section on the basis of the need of such agencies.

(2) Determination

In determining need under paragraph (1), the State educational agency may consider the number of homeless children and homeless youth enrolled in preschool, elementary, and secondary schools within the area served by the agency, and shall consider the needs of such children and youth, and the ability of the agency to meet such needs. Such agency may also consider—

(A) the extent to which the proposed use of funds would facilitate the enrollment, retention, and educational success of homeless children and youth;

(B) the extent to which the application reflects coordination with other local and State agencies that serve homeless children and youth, as well as the State plan required by section 11432(e) of this title;

(C) the extent to which the applicant exhibits in the application and in current practice a commitment to education for all homeless children and youth in its jurisdiction; and

(D) other criteria as the agency determines appropriate.

(d) Application

(1) In general

A local educational agency that desires to receive a grant under this section shall submit an application to the State educational agency at such time, in such manner, and containing or accompanied by such information as the State agency may reasonable require according to guidelines issued by the Secretary. Each such application shall include—

(A) a description of the services and programs for which assistance is sought and the problems sought to be addressed through the provision of such services and programs;

(B) assurances that the applicant complies with or will use requested funds to come into compliance with paragraphs (3) through (9) of section 11432(e) of this title;

(C) an assurance that assistance under the grant will supplement and not supplant funds used before the award of the grant for purposes of providing services to homeless children and homeless youths; and

(D) a description of policies and procedures that the agency will implement to ensure that activities carried out by the agency will not isolate or stigmatize homeless children and homeless youth.

(3)[1] Terms of awards

Grants awarded under this section shall be for terms of not to exceed 2 years.

---

[1] So in original. There was no subpar. (2) enacted.

(e) Reports

Each State educational agency that receives a grant under this section for any fiscal year shall, as part of the plan of the State submitted under section 11432(c)(4) of this title, provide to Secretary data concerning—

(1) the number of homeless children and homeless youths served with assistance provided under the grant under this section; and

(2) a description of the success of the program under this section in allowing homeless children and homeless youths to enroll in, attend, and succeed in school.

(Pub.L. 100-77, Title VII, § 723, July 22, 1987, 101 Stat. 527; Pub.L. 100-628, Title VII, § 702(b), Nov. 7, 1988, 102 Stat. 3245; Pub.L. 101-645, Title VI, 612(c), Nov. 29, 1990, 104 Stat. 4739.)

§ 11434. National responsibilites

(a) General accounting office

The Comptroller General of the United States shall perpare and submit to the Congress not later than June 30, 1988, a report on the number of homeless children and youth in all States.

(b) Secretarial responsibilities

(1) The Secretary shall monitor and review compliance with the provisions of this part in accordance with the provisions of the General Education Provisions Act [20 U.S.C.A. § 1221 et seq.]. In reviewing the State plans submitted by the State educational agencies under section 11432(e) of this title, the Secretary shall evaluate whether State laws, policies, and practices described in such plans adequately address the problems of homeless children and homeless youth relating to access to education and placement as described in such plans.

(2)(A) The Secretary, in consultation with persons and organizations that are knowledgeable about the needs of

homeless children and youth, shall, through the awarding of a grant, or through entering into a contract or cooperative agreement, conduct a study to determine the best means of identifying, locating, and counting homeless children and youth for the purposes of this part. Such persons and organizations to be consulted shall include representatives of State coordinators, local educational agencies with substantial numbers of homeless children and youth, local government agencies with responsibility for administering homeless shelters, and advocacy groups representing the interests of homeless children and youth. The Secretary shall also consult with the Secretary of Health and Human Services and the Secretary of Housing and Urban Development, as appropriate, in carrying out this paragraph.

(B) The study conducted under subparagraph (A) shall consider—

(i) the appropriate definition of the terms "homeless child" and "homeless youth";

(ii) the experience of the 1990 Census in identifying, locating, and counting homeless children and youth;

(iii) appropriate methodolgies for identifying, locating, and counting such children and youth, including using schools, shelters, and other social service agencies to collect data; and

(iv) the projected accuracy of the methodologies identified in clause (iii), and the costs associated with the use of each methodology;

to determine the number of homeless children and youth in the United States to create as accurate an account as possible of the number, location, and living circumstances of such children and youth, including the number of such children and youth that are attending school regularly, part-time, or not at all, and reasons for the nonattendance of such children and youth.

(C)(i) Not later than 240 days after November 29, 1990, the Secretary shall prepare and submit, to the appropriate committees of Congress, a report containing the results of the study conducted under subparagraph (A) and the estimated costs of making the estimates required under clause (ii).

(ii) Not later than December 1, 1992, the Secretary, in consultation with the appropriate committees of Congress, and through the use of appropriate statistical methodology, shall, through a grant, contract or cooperative agreement, determine accurate estimates of the number of homeless children and youth throughout the Nation and the number of such children and youth attending school.

(D) The Secretary may reserve not more than $250,000 from amounts appropriated under section 11432(g) of this title in 1991 to carry out the study required under subparagraph (A).

(E) There are authorized to be appropriated such sums as may be necessary in 1992 to perpare the report and estimates required under subparagraph (C).

(3) The Secretary shall provide such support and technical assistance to the State educational agencies as is required by such agencies to carry out their responsibilities under this part.

(4) The Secretary shall prepare and submit a report to the Congress on the programs and activities authorized by this part at the end of each fiscal year.

(5) The Secretary shall compile and submit a report to the Congress containing the information received from the States pursuant to section 11432(d)(3) of this title within 45 days of its receipt.

(5)[1] The Secretary shall conduct evaluation and dissemination activities of programs designed to meet the educational needs of homeless elementary and secondary school students.

---

[1] So in orginal.

(6) The Secretary shall require applications for grants under this part to be submitted to the Secretary not later than the expiration of the 60-day period beginning on the date that funds are available for purposes of making such grants and shall make such grants not later than the expiration of the 120-day period beginning on such date.

(7) The Secretary, based on the infomation received from the States and information gathered by the Secretary under paragraph (1), shall determine the extent to which State educational agencies are ensuring that each homeless child and homeless youth has access to a free ap[illegible]opriate public education as described in section 11431(1) of this title.

(Pub.L. 100-77, Title VII, § 724, July 22, 1987, 101 Stat. 528; Pub.L. 101-645, Title VI, § 612(d), Nov. 29, 1990, 104 Stat. 4742.)

§ 11435. Definitions

As used in this part—

(1) the term "Secretary" means the Secretary of Education; and

(2) the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(Pub.L. 100-77, Title VII, § 726, formerly § 725, July 22, 1987, 101 Stat. 528; Pub.L. 101-628, Title VII, § 702(c), Nov. 7, 1988, 102 Stat. 3245; renumbered § 726 Pub.L. 101-645, Title VI, § 613(1), Nov. 29, 1990, 104 Stat. 4743.)

FILED
OCT 31 1994
OFFICE OF THE CLERK

No. 94-578

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,
v.
BRENDA LAMPKIN, AS LEGAL GUARDIAN OF JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL J. LARKIN, JR.*
EVELYN S. TANG
SUSAN S. QUARNGESSER
KING & SPALDING
1730 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20006
(202) 737-0500

MARIA FOSCARINIS
NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY
918 F Street, N.W.
Suite 412
Washington, D.C. 20004
(202) 638-2535

* Counsel of record
Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether homeless children can seek relief under 42 U.S.C. § 1983 (1988) for the deprivation of educational rights guaranteed them by the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11301 *et seq.* (1988 & Supp. IV 1992).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
A. The McKinney Act	1
B. The Proceedings Below	3
REASONS FOR DENYING THE WRIT	4
I. THE COURT OF APPEALS' DECISION IS INTERLOCUTORY	4
II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE QUESTION PRESENTED IN THE PETITION	5
III. THE DECISION BELOW IS CORRECT	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Alibston v. Main Comm'r of Human Servs., 7 F.3d 258 (1st Cir. 1993)	6
American Constr. v. Jacksonville, Tampa & Key West Ry., 148 U.S. 372 (1893)	4
Brotherhood of Locomotive Firemen & Enginemen v. Baugor & Aroostock R.R., 389 U.S. 327 (1967)	4
Clifton v. Shafer, 969 F.2d 278 (7th Cir. 1992)	5, 6
Golden State Transit v. Los Angeles, 493 U.S. 103 (1989)	7
Hamilton-Brown Shoe v. Wolf Bros. & Co., 240 U.S. 251 (1916)	4
Horn by Parks v. Madison County Fiscal Court, 22 F.3d 653 (6th Cir.), cert. denied, 63 U.S.L.W. 3263 (1994)	5, 6
Loschiavo v. Dearborn, 33 F.3d 548 (6th Cir. 1994)	6
Price v. Akaka, 3 F.3d 1220 (9th Cir. 1993)	7
Resident Council of Allen Parkway Village v. HUD, 980 F.2d 1043 (5th Cir. 1993)	5, 6
Stowell v. Ives, 976 F.2d 65 (1st Cir. 1992)	5, 6
Suter v. Artist M, 112 S. Ct. 1360 (1992)	*passim*
Virginia Military Institute v. United States, 113 S. Ct. 2431 (1993)	4
Wilder v. Virginia Hospital Ass'n, 110 S. Ct. 2510 (1990)	*passim*
Wisniewski v. United States, 353 U.S. 901 (1957)	6
Wood v. Tompkins, 33 F.3d 600 (6th Cir. 1994)	6

Statutes:

42 U.S.C.	
§ 11301(b)(2) (1988)	1
§ 11421(d)	2
§ 11431-35 (Supp. IV 1992)	1
§ 11432(a)-(e)	*passim*

Miscellaneous:

R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 4.18 (6th ed. 1986)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-578

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

BRENDA LAMPKIN, AS LEGAL GUARDIAN OF JESSICA LAMPKIN AND CHRISTINE LAMPKIN, MINORS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

A. The McKinney Act

In 1987, Congress enacted the McKinney Homeless Assistance Act in response to "the critically urgent needs of the homeless," 42 U.S.C. § 11301(b)(2) (1988), including the proper education of their children. 42 U.S.C. §§ 11431-35 (Supp. IV 1992). The goal of Title VII of the McKinney Act is to assure that "each child of a homeless individual and each homeless youth have access to a free, appropriate public education," that states review and revise "laws, regulations, practices, or policies that may act as a barrier to the enrollment, attendance, or success in school of homeless children and homeless youth," and that "homelessness alone . . . not be sufficient reason to separate students from the mainstream school environ-

ment." *Id.* § 11431. To achieve that goal, Congress empowered the Secretary of Education to grant funds to states participating in the programs authorized by the Act. *Id.* § 11432(a).[1] States receiving funds under the McKinney Act must comply with its several requirements.

The McKinney Act directs that "[g]rants . . . shall be used . . . to carry out the policies set forth in section 11431 of this title in the State," "to establish or designate an Office of Coordinator of Education of Homeless Children and Youth," and "to prepare and carry out the State plan described in subsection (e) of this section." *Id.* § 11432(c)(1), (3), (4). Subsection (d) outlines the duties of the Coordinator, which include the duty to "develop and carry out the State plan" and to "facilitate coordination" between state educators and other social service providers in serving homeless children and their families. *Id.* § 11432(d)(2) & (4). Each state plan must contain provisions designed, *inter alia*, to "develop programs for school personnel" and to "heighten the awareness . . . of the specific educational needs of . . . homeless youths." *Id.* § 11432(e)(1)(C) Each state also must address problems regarding educating homeless children and youths, including problems caused by transportation difficulties, immunization and residency requirements, lack of birth certificates and other school records, or guardianship issues. *Id.*, § 11432(e)(1)(G)(i)-(ii).

In addition, the McKinney Act specifically directs local education agencies to enroll homeless children in the school that is in their best interest to attend; to provide transportation services comparable to those provided to other students; to maintain school records so they are available for transfer in a timely fashion; to coordinate with other social service agencies; to designate a homelessness liaison; and to review and revise policies that act

---

[1] The District of Columbia is deemed a state for purposes of the Act. 42 U.S.C. § 11421(d); Pet. App. 4a.

as barriers to the continued education of homeless children. *Id.* § 11432(e)(3)-(a).

B. The Proceedings Below

On April 15, 1992, respondents filed a complaint in the United States District Court for the District of Columbia seeking declaratory and injunctive relief for petitioners' violations of the McKinney Act. Petitioners moved to dismiss the complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P., on the ground that respondents could not seek relief under 42 U.S.C. § 1983 for such a claim. The district court granted petitioners' motion and dismissed the complaint. Pet. App. 21a-36a.

The court of appeals reversed the district court's judgment and remanded the case for further proceedings. Pet. App. 1a-20a. After reviewing *Wilder v. Virginia Hospital Ass'n*, 110 S. Ct. 2510 (1990), and *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), the majority concluded that the McKinney Act created rights enforceable under Section 1983. The court reasoned that the Act was designed to benefit homeless children, Pet. App. 10a, and "provides specific directions for the plan's execution," *id.* at 11a, through statutory "obligations" set forth in great detail in the text of the Act, *id.* at 12a. See *id.* at 10a-15a.

Judge Sentelle dissented. He noted that "the question is a close one," and he did "not disagree with the majority's summary of [*Suter* and *Wilder*,] only with its conclusion as to the side upon which the McKinney Act falls." Pet. App. 16a.

REASONS FOR DENYING THE WRIT

The decision below is interlocutory; it does not conflict with any decision of this Court or of any other court of appeals; and it is correct. Accordingly, review by this Court is not warranted.

I. THE COURT OF APPEALS' DECISION IS INTERLOCUTORY.

The court of appeals did not affirm a final judgment against petitioners holding them liable under Section 1983 for a violation of the McKinney Act. Instead, the court below held only that respondents can seek relief under Section 1983 for an alleged McKinney Act violation, and remanded the case to the district court for further proceedings. Petitioners are therefore in the same position that they would have occupied if the district court had denied their motion to dismiss and had required petitioners to present a defense on the merits to the allegations in respondents' complaint. Accordingly, this case is presently in an interlocutory posture.

Under these circumstances, review by this Court at this time would be premature. If the court of appeals upholds a final judgment adverse to petitioners, petitioners can then seek review of the claim presented in this petition and any other claim that they then have available to them. Before then, review by this Court is not warranted. See, *e.g.*, *Virginia Military Institute v. United States*, 113 S. Ct. 2431, 2432 (1993) (opinion of Scalia, J.); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Constr. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 4.18, at 224-226 (6th ed. 1986).

II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE QUESTION PRESENTED IN THE PETITION

Petitioners maintain that the D.C. Circuit's decision in this case is inconsistent with decisions from the First, Fifth, Sixth, and Seventh Circuits. None of those decisions, however, involved the McKinney Act; each one examined an entirely different law. See *Horn by Parks v. Madison County Fiscal Court*, 22 F.3d 653 (6th Cir.) (Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. 5633(a)), cert. denied, 63 U.S.L.W. 3263 (U.S Oct 3, 1994) (No 94-164); *Resident Council of Allen Parkway Village v HUD*, 980 F.2d 1043 (5th Cir.) (Independent Agencies Appropriations Act, 1988, Pub. L. No. 100-202, Tit. IV, § 415, 101 Stat. 1329-213 (Frost-Leland Amendment)), cert. denied, 114 S. Ct. 75 (1993); *Stowell v. Ives*, 976 F.2d 65 (1st Cir. 1992) (Aid to Families with Dependent Children (AFDC) program, 42 U.S.C. §§ 601-615 (1988 & Supp. I 1989)); *Clifton v. Shafer*, 969 F.2d 278 (7th Cir. 1992) (a regulation implementing the AFDC program, 45 C.F.R. § 205.10(a)(6)). In fact, the decision below is the first decision by any federal or state appellate court to address the question whether private parties can seek judicial enforcement of the McKinney Act under Section 1983. Because this Court made clear in *Suter* that each statute must be interpreted according to its own terms, 112 S. Ct. at 1367 n.8, the decisions cited by petitioners do not (and cannot) conflict with the decision below.

Petitioners nonetheless claim that the approach followed by the D.C. Circuit in analyzing the issue of statutory interpretation presented by this case differs from the approach followed by those other courts. Petitioners contend that "[s]ince this Court's decision in *Suter*, the lower federal courts have questioned whether this Court continues to subscribe to the analytical framework of *Wilder*," in part because, in petitioners' view, *Wilder* and

Suter cannot be reconciled. Pet. 24-25. That claim lacks merit.

In each case cited by petitioners, the court of appeals analyzed the Section 1983 question in accordance with the approach that this Court set forth in *Wilder* and *Suter*. See *Horn*, 22 F.3d at 657-58; *Resident Council*, 980 F.2d at 1050-53; *Stowell*, 976 F.2d at 68; *Clifton*, 969 F.2d at 283-85. None of those courts held that *Suter* had overruled *Wilder* or that the two cases conflict. On the contrary, the Fifth Circuit in *Resident Council* expressly declined to decide whether *Suter* had modified the framework articulated in *Wilder*, 980 F.2d at 1052; the Sixth Circuit was silent on the matter, *Horn*, 22 F.3d at 657-58; the Seventh Circuit in *Clifton* noted that this Court in *Suter* distinguished *Wilder*, 969 F.2d at 283-85; and the First Circuit in *Stowell* wrote that that "it is much too early to post epitaphs for *Wilder* and its kin," 976 F.2d at 68. Thus, like the D.C. Circuit in this case, none of the decisions cited by petitioners ruled that *Wilder* and *Suter* are irreconciliable.[2] The cases cited by petitioners thus fail to support their position that the courts of appeals are in disarray about the proper interpretation of those decisions.[3]

---

[2] Petitioners further contend that there are intracircuit conflicts within the Sixth and Seventh Circuits regarding the general framework for analyzing Section 1983 claims. Pet. 27. An allegation of an intracircuit conflict, however, is for the court of appeals, not this Court, to resolve. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

[3] Furthermore, several other circuit court decisions have found the two cases to be compatible. *See, e.g., Loschiavo v. Dearborn*, 33 F.3d 548, 557 n.2 (6th Cir. 1994) ("Although some believe that . . . *Suter* superseded the well-established framework set forth in *Wilder*, this Court has joined other circuits in concluding that the two opinions may be harmonized."); *Wood v. Tompkins*, 33 F.3d 600, 606 (6th Cir. 1994) (rejecting defendant's argument that *Suter* significantly changed the law and ruling that *Suter* "is entirely consistent with *Wilder*"); *Albiston v. Maine Comm'r of Human Servs.*, 7 F.3d 258, 263 (1st Cir. 1993) (*Suter* "left the

III. THE DECISION BELOW IS CORRECT

In *Wilder v. Virginia Hospital Ass'n*, 110 S. Ct. 2510 (1990), this Court articulated a two-part test for use in determining whether a party may seek relief under 42 U.S.C. § 1983 for the violation of a federal law.[4] First, the provision in question must be intended to benefit the putative plaintiff. *Id.* at 2517. Second, the provision must create a "binding obligation" on the government, rather than "reflect[] merely a 'congressional preference' for a certain kind of conduct," *id.* (quoting *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 19 (1981)), and the interest so protected may not be so "vague and amorphous such that it is beyond the competence of the judiciary to enforce," *id.* (internal punctuation omitted; quoting *Golden State Transit v. Los Angeles*, 493 U.S. 103, 106 (1989)). Applying that test, the Court held in *Wilder* that health care providers can sue under Section 1983 to challenge a state's Medicaid reimbursement under the Boren Amendment to the Social Security Act, 42 U.S.C. § 1396a(a)(13)(A) (1982 ed. & Supp. V 1992), because that amendment created "a right, enforceable in a private cause of action pursuant to section 1983, to have the State adopt rates that it finds are reasonable and adequate rates to meet the costs of an efficient and economicial health care provider." 110 S. Ct. at 2525.

---

basic *Wilder* framework intact"); *Price v. Akaka*, 3 F.3d 1220 (9th Cir. 1993) (*Suter* does not require overruling prior holdings that the Hawaii Admissions Act creates enforceable rights), cert. denied, 114 S. Ct. 1645 (1994).

[4] Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Two Terms later, in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), this Court addressed the question whether private individuals can enforce the Adoption Assistance and Child Welfare Act of 1980 (Adoption Act), 42 U.S.C. §§ 620-28, 670-79a, under Section 1983. The Court ruled that the Adoption Act was not enforceable under Section 1983, for two reasons. Distinguishing *Wilder*, the Court explained that that the Boren Amendment "actually required the States to adopt reasonable and adequate rates" and that the "statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates." 112 S. Ct. at 1368 (citing *Wilder*, 110 S. Ct. at 2522 n.17). By contrast, the Court held, the Adoption Act offered no guidance as to how "reasonable efforts" are to be measured; how the states must comply with that directive, the Court concluded, "was within broad limits, left up to the State." *Id.* Also, the Court stated that the Adoption Act contained an alternative enforcement mechanism. *Id.* Accordingly, the Court concluded "that the 'reasonable efforts' language does not unambiguously confer an enforceable right upon the Act's beneficiaries." *Id.* at 1370. In so ruling, the Court in *Suter* neither rejected its earlier holding in *Wilder*, nor created an entirely new framework for analyzing the availability of relief under Section 1983. Rather, *Suter* "counsel[ed] that each statute must be interpreted by its own terms," *id.* at 1367 n.8, and distinguished *Wilder* on its facts, *id.* at 1368.

The court below faithfully applied the teachings of *Wilder* and *Suter*. There is no dispute that respondents, homeless children and youths, are the intended beneficiaries of the educational provisions of the McKinney Act. Pet. App. 10a ("The parties all agree that the McKinney Act was enacted to benefit homeless children. *See* 42 U.S.C. § 11431."). In addition, it is clear that there is no adequate alternative enforcement mechanism that can be invoked to bring parties like petitioners into compliance with the Act's obligations. Pet. App. 13a ("the

McKinney Act contains no statutory mechanism for the administrative enforcement of the beneficiaries' rights"). Accordingly, the only question is whether the McKinney Act imposes on petitioners duties that are sufficiently clear and specific so that they can be enforced under Section 1983. In undertaking that inquiry, the court of appeals carefully analyzed the text of the McKinney Act and found that it more closely resembles the Boren Amendment in *Wilder* than the Adoption Act in *Suter*. See *id.* at 5a-15a. Specifically, the court concluded that "the obligations [the McKinney Act] imposes on participating States are clear," *id.* at 11a, and that the language is "specific" and "mandatory," *id* at 12a. That conclusion is correct, as the text of the McKinney Act reveals.[5] Moreover, the court noted that the statutory provisions of the McKinney Act are not "overly 'vague and amorphous.' " *Id.* at 14a (quoting *Wilder*, 110 S. Ct. at 2517). Based on those conclusions, the court held that "the McKinney Act confers enforceable rights on its beneficiaries and that [respondents] may invoke section 1983 to enforce those rights." *Id.* at 15a. In sum, the D.C. Circuit followed this Court's admonition in *Suter*, 112 S. Ct. at 1367 n.8, that each law must be interpreted according to its own terms.

Petitioners claim that the decision below saddles them with large and unforseeable financial obligations. Pet. 3.

---

[5] See, *e.g.*, 42 U.S.C. § 11432(e)(3) ("The local educational agency . . . shall . . . enroll the child . . . [in the school that] is in the child's best interest"); *id.* § 11432(e)(5) ("Each homeless child shall be provided services comparable to services offered to other students in the school"); *id.* § 114532(c)(6) (requiring that records kept by the school "shall be maintained" so as to be available when the child enters a new school district); *id.* § 11432(e)(7) ("Each local educational agency . . . shall coordinate with local social services agencies" to serve homeless children and their families); *id.* § 11432(e)(8) (requiring that the local educational agency "shall designate a homelessness liaison"). See also Pet. App. 12a (noting that paragraph (2) of 42 U.S.C. 11432(e) identifies those specifications as "requirements," rather than as "options").

That is a canard. The decision below only gives respondents the right to seek relief under Section 1983 for violations of whatever obligations petitioners voluntarily assumed by accepting federal funds under the McKinney Act. The D.C. Circuit did not decide what those obligations are, only that respondents are entitled to judicial relief if petitioners have forsaken their statutory responsibilities. In concluding that homeless children in the District may invoke Section 1983 to enforce their rights to a public education, the court of appeals did not impose any new obligations on the District of Columbia. Rather, that court simply eschewed an interpretation of that law that would render it "a dead letter." *Wilder*, 110 S. Ct. at 2520.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL J. LARKIN, JR.*
EVELYN S. TANG
SUSAN S. QUARNGESSER
KING & SPALDING
1730 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20006
(202) 737-0500

MARIA FOSCARINIS
NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY
918 F Street, N.W.
Suite 412
Washington, D.C. 20004
(202) 638-2535

* Counsel of record

Counsel for Respondents